COURT, U. S.
Supreme Court, U. S.
FILED
AUG 6 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-82

KITTYHAWK, LTD.,
ESCO DISTRIBUTING CO.

and

MILES FABRICS OF MEMPHIS, INC.,
Petitioners,

v.

CITY OF MIDDLETOWN,
MIDDLETOWN SHOPPING CENTER, INC.

and

MANUEL D. MAYERSON,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

MERLE F. WILBERDING
600 IBM Building
Dayton, Ohio 45402
Counsel for Petitioners

Of Counsel:
COOLIDGE, WALL, MATUSOFF,
WOMSLEY & LOMBARD
600 IBM Building
Dayton, Ohio 45402

COURT INDEX PRESS, INC. — 809 Walnut Street, Cincinnati, Ohio 45202 — (513) 241-1450

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions presented	2
Constitutional provisions and ordinances	3
Statement of the case	3
Reasons for granting the writ	8
1. The Decision Below Conflicts in Principle with the Decision of *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), as to the Proper Interpretation of the Constitutionality of a Municipal Zoning Ordinance and, therefore, has Deprived Petitioner of Liberty and Property without Due Process of Law or Just Compensation.	8
2. The Petitioner is being Deprived of Equal Protection of the Law.	11
3. The Decision Below raises Significant and Recurring Problems Concerning Whether a City's Sudden and Unexplained Reversal of Position, after Substantial Financial Commitments were Expended in Reliance on the Earlier Position, Constitutes an Abuse of the Exercise of its Police Power in Violation of the Fourteenth Amendment.	13
Conclusion	15
Appendix	17

CITATIONS

Cases: **Page**

Belle Terre v. *Boraas*, 94 S. Ct. 1536 (1974) 11, 15
Berman v. *Parker*, 348 U.S. 26 (1954) 11
Burns v. *Ohio*, 360 U.S. 252 (1959) 2
City Railway Co. v. *Citizens' Street Railroad Co.*, 166 U.S. 557 (1897) 14
District of Columbia v. *Cahill*, 54 F.2d 453 (App. D.C. 1931) 15
Dobbins v. *Los Angeles*, 195 U.S. 223 (1904) 13-14
Euclid v. *Ambler Realty Co.*, 272 U.S. 365 (1926) 8, 10, 11
Evansville v. *Gaseteria*, 51 F.2d 232 (7th Cir. 1931) .. 15
Henle v. *Euclid*, 97 Ohio App. 258, 125 N.E.2d 355, *aff'd mem.*, 162 Ohio St. 280, 122 N.E.2d 792 (1954) 10
Loesch Allotment Co. v. *Newburgh Heights*, 100 N.E.2d 543 (C.P. Cuyahoga County 1950) 8
Matthews v. *Huwe*, 269 U.S. 262 (1925) 2
Nectow v. *Cambridge*, 277 U.S. 183 (1928) 8, 10
Radice v. *New York*, 264 U.S. 292 (1924) 8
Tumey v. *Ohio*, 273 U.S. 510 (1927) 2

Miscellaneous:

Babcock, The Zoning Game (1966) 10
Haar, "In Accordance With a Comprehensive Plan," 68 Harv. L. Rev. 1154 (1955) 10
McQuillan, Municipal Corporations, Vol. 8 (3rd Ed.) . 10
Rules of the Supreme Court, Rule 19 9

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. ———

KITTYHAWK, LTD.,
ESCO DISTRIBUTING CO.

and

MILES FABRICS OF MEMPHIS, INC.,

Petitioners,

v.

CITY OF MIDDLETOWN,
MIDDLETOWN SHOPPING CENTER, INC.

and

MANUEL D. MAYERSON,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

The Petitioners, Kittyhawk, Ltd., Esco Distributing Co., and Miles Fabrics of Memphis, Inc., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Ohio entered in this proceeding on May 10, 1974.

OPINIONS BELOW

The judgment of the Supreme Court of the State of Ohio dismissing the Petitioners' appeal, not yet reported, appears in the Appendix hereto. The opinion of the Court of Appeals, First Appellate District of Ohio, Butler County, Ohio, not yet reported, appears in the Appendix hereto. The decision of the Court of Common Pleas, Butler County, Ohio, not yet reported, appears in the Appendix hereto.

JURISDICTION

The appeal to the Supreme Court of the State of Ohio was dismissed on May 10, 1974, for the reason that no substantial constitutional question existed.[1] This petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

1. Whether the zoning restriction of the subject property to C-2 uses ("catering primarily to highway-associated demands") when similiarly situated property is not so restricted is a denial of the "equal protection" clause of the Fourteenth Amendment to the United States Constitution.

2. Whether the zoning restriction of the subject property to C-2 uses ("catering primarily to highway-associated demands") is an unreasonable deprivation of property without due process of law in contravention of the Fourteenth Amendment of the United States Constitution.

---

[1] Because of this language, the dismissal is a reviewable order. *Matthews* v. *Huwe*, 269 U.S. 262 (1925); *Tumey* v. *Ohio*, 273 U.S. 510 (1927); *Burns* v. *Ohio*, 360 U.S. 252 (1959).

3. Whether the City's actions in issuing a certificate of zoning compliance and an original and amended building permits conferred such significant property rights upon the Petitioners that the due process clause of the Fourteenth Amendment requires that the theory of estoppel should be imposed upon the City.

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

United States Constitution, Fourteenth Amendment:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

City of Middletown, Ohio, Zoning Ordinance:

> Chapter 1139, "C-1" Convenience Commercial District (Appears in Appendix hereto)
>
> Chapter 1141, "C-2" Roadside Commercial District (Appears in Appendix hereto)
>
> Chapter 1143, "C-3" Community Commercial District (Appears in Appendix hereto)
>
> Chapter 1173, Administration & Enforcement (Appears in Appendix hereto)

STATEMENT OF THE CASE

Petitioner, Kittyhawk, Ltd., an Ohio partnership, purchased in early 1972 approximately 14 acres in the City

of Middletown, Ohio. On July 5, 1972, a certificate of zoning compliance was issued to Petitioner, Kittyhawk, Ltd. Under Section 1173.03 of the Middletown Zoning Ordinance, a building permit can be issued only after a certificate of zoning compliance has been obtained which, under the same section, can be issued only after the intended *uses* conform to the zoning ordinance. The intended uses by the Petitioner were included in the plans submitted to the City's zoning administrator.[2] Four building permits were issued, (each specifying the proposed uses), and construction commenced.

On August 9, 1972, when construction of the building was 55% complete, Kittyhawk, Ltd. obtained an amended building permit which combined two of the originally proposed units into one new proposed use. The commissioner of inspection was apprised of the revised intended use and issued the amended building permit without requiring Petitioner to resubmit the plans to the zoning administrator.

Thereafter, on October 17, 1972, when the three leases were executed[3] and construction nearly 90% complete, the Petitioner received a letter from the City declaring that the proposed uses were not permitted in a C-2 zone.

On October 25, 1972, the City of Middletown filed an action seeking a permanent injunction prohibiting the

---

[2] It should be noted that Section 1141.02 of Zoning Ordinance permits in a C-2 district any additional business which is "of the same general character" as the specifically permitted uses. The property was located in a C-2 zoning classification area ("catering to highway-associated demands").

[3] Petitioners Esco Distributing Co. and Miles Fabrics of Memphis, Inc. are lessees of Petitioner Kittyhawk, Ltd. The uses by the third lessee have not been challenged by Respondents. Hereinafter, unless expressly stated otherwise, "Petitioner" shall refer to Kittyhawk, Ltd.

use of Petitioner's premises as a retail discount and catalog store and as a retail fabric store. The hearing on the injunction commenced on November 2, 1972, before Judge Cramer, Court of Common Pleas, Butler County, Ohio. During the hearing, Middletown Shopping Center, Inc. and Manuel D. Mayerson were permitted to appear as Intervenors on behalf of the City of Middletown.

At the hearing, Petitioners challenged the validity of the Middletown zoning ordinance because, *inter alia*: (1) the C-2 restriction imposed on its property was (a) unreasonable, confiscatory and a denial of due process of law and (b) was unreasonable and a denial of equal protection of the law since similarly situated property was not so restricted; (2) the City should be estopped from pursuing an injunction because of its employees' action in issuing a certificate of zoning compliance and the requisite building permits.

The equal protection assertion was directed at Petitioner's position vis-a-vis that of Middletown Shopping Center, Inc., which was adamently opposing the Petitioner's intended uses. The illustration (p. 6) suggests the Petitioner's property (outlined in heavy black line) within the C-2 zone and the adjoining C-3 zone in which Middletown Shopping Center conducts its operations.

The Petitioner asserted the constitutional questions in the pleadings before the trial court, before the Court of Appeals, and before the Supreme Court of the State of Ohio.

The Petitioner's contentions were well taken by the trial court which, therefore, dissolved the temporary restraining order and denied the motion for a permanent injunction, holding:

> "We do find after what we believe to be a full and fair consideration of all the evidence that the C-2

C-3
ZONE
MIDDLETOWN
SHOPPING
CENTER
N
GRAND AVENUE
ZONE
LINE
BREIEL BLVD
C-2
ZONE
C-2
ZONE
LEWIS
PETITIONERS

> restriction of the defendants' property to C-2 uses is unreasonable, discriminatory and constitutes a denial of equal protection of law. We further find that the Zoning Ordinance, in so far as it attempts to distinquish between C-2 and C-3 uses affecting the premises here in question, is not designed to nor does it promote or have any relation to the public health, safety, morals and general welfare and is, therefore, void as to controlling or in any manner affecting the defendants' use of the property here in issue."

Notwithstanding the Petitioner's continued assertion that the purported zoning classifications would deprive them of property without due process of law and constituted a denial of equal protection, the Court of Appeals, First Appellate District of Ohio, Butler County, Ohio, reversed the order of the trial court and held, in essence, that the zoning classifications in themselves and as applied were valid and, accordingly, no constitutional violations were present. The Supreme Court of the State of Ohio overruled a motion to certify the record and dismissed the appeal, concluding that no substantial constitutional question existed.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS IN PRINCIPLE WITH THE DECISION OF EUCLID v. AMBLER REALTY CO., 272 U.S. 365 (1926), AS TO THE PROPER INTERPRETATION OF THE CONSTITUTIONALITY OF A MUNICIPAL ZONING ORDINANCE AND, THEREFORE, HAS DEPRIVED PETITIONER OF LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW OR JUST COMPENSATION.

The Petitioner recognizes, of course, the necessity and propriety for a municipality to promulgate a zoning ordinance to safeguard the public health, safety, morals and general welfare of the public.

However, the ordinance must be reasonable in itself and must be reasonable as applied to the subject property before it can withstand constitutional scrutiny. *Nectow* v. *Cambridge*, 277 U.S. 183 (1928); *Loesch Allotment Co.* v. *Newburgh Heights*, 100 N.E.2d 543 (C.P. Cuyahoga County 1950).

Further, the Petitioner does not challenge this Honorable Court's pronouncement in *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 389 (1926), that if "the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." *See also Radice* v. *New York*, 264 U.S. 292 (1924).

But, if there can be no reasonable "fairly debatable" question as to the zoning ordinance itself or as it is applied to the subject property, then it is erroneous to uphold the

zoning ordinance and, since that type of decision is "not in accord with applicable decisions of this court", consideration and review by this Honorable Court is appropriate. Rule 19, *Rules of the Supreme Court of the United States.*

In the instant case, the Petitioner challenges the reasonableness of the zoning ordinance itself. The zoning ordinance purports to distinguish between the C-2 uses and the C-3 zones by asserting that C-2 uses shall cater "primarily to highway-associated demands" while C-3 uses may have uses providing "both convenience goods and major shopping needs for the entire city or a major portion thereof." The Petitioner reasserts its argument that the C-2 and C-3 zoning chapters purport to distinguish between uses when *no difference* exists which can be said to be reasonably related to the objects of the legislation. In reviewing the uses first permitted in each of the two zoning districts, which are fully set out in the Appendix hereto, it is quite clear that the uses specified therein cannot be reasonably distinguished as to "highway-associated demands" and as to "convenience goods . . . for the entire city." On the contrary, all the uses denoted in those two chapters just as easily can be described as "catering to "highway-associated demands" as they can be described as providing "convenience goods for the entire city." There simply is no valid justification for the different treatment accorded these zoning districts. Instead, the classification is invidious, arbitrary and unreasonable.

> "Unreasonable discrimination in the classification of uses and restrictions under zoning is unconstitutional and void. It violates both equal protection and due process of law. Invidious distinctions and discriminations are prohibited. A zoning ordinance is invalid where the restrictions create a monopoly.

> "The classification cannot prohibit or restrict certain uses and permit or not restrict other uses where there is no valid basis, reasonably related to the public health, safety, morals, welfare or other object of the police power, for distinguishing between them." 8 McQuillan, Municipal Corporations 203 (3rd Ed.).

Accordingly, the Petitioner submits that the instant zoning ordinance, in and of itself, must fall because there can be no rational "fairly debatable" questions as to the purported reasonableness of the classification distinctions between C-2 uses and C-3 uses.[4]

Even assuming, *arguendo*, that a reasonable distinction can be drawn within the four corners of the ordinance, there can be no doubt that, as *applied* to Petitioner's property, the ordinance is arbitrary, capricious, unreasonable and not "fairly debatable;" hence, it is in conflict with *Euclid* v. *Ambler Realty Co., supra*, and must fall. *Nectow* v. *Cambridge, supra.*

As the illustration herein reflects, the Petitioner's property is in a C-2 zoning area, *i.e.*, one which caters primarily to "highway-associated demands." Yet, as the illustration also reflects, Petitioner's property has no "highway" frontage. Its only access to Breiel Boulevard is from Lewis Street which is a 214 foot stub road that, as the record suggests, may not even be a dedicated street.[5]

---

[4] The City and the Intervenors have throughout this litigation placed substantial reliance on their claim that the zoning ordinance was *comprehensive* and, therefore, it is not assailable. The Petitioner suggests that their argument is a *non sequitur* and thus their reliance is misplaced. A *comprehensive* plan means simply that the zoning ordinance applies to the entire city; it is no independent justification for its internal validity. Haar, *"In Accordance with a Comprehensive Plan,"* 68 Harv. L. Rev. 1154 (1955). *See also* Babcock, The Zoning Game 115-125 (1966); *Henle* v. *Euclid*, 97 Ohio App. 258, 125 N.E. 2d 355, *aff'd mem.*, 62 Ohio St. 280, 122 N.E.2d 792 (1954).

[5] The record and exhibits thereto suggest that there are no curb

No one can seriously claim that a property, having no frontage access to a major thoroughfare, can reasonably be restricted to "highway-associated" uses. The capriciousness of that result is so patent that reasonable minds could not differ and, therefore, the issue cannot be "fairly debatable."

Thus, the Petitioner's land is restricted to "highway-associated demands;" yet the Petitioner has no highway access frontage. Further, the extremely limited uses permitted in a C-2 zone, vis-a-vis those in a C-3 zone, have effectively confiscated the Petitioner's property rights and deprived Petitioner of its basic liberty to develop its property in a manner which could be reasonably related to the public health, safety, morals and welfare of the general public. *See generally, Euclid* v. *Ambler Realty Co., supra; Berman* v. *Parker,* 348 U.S. 26 (1954); *Belle Terre* v. *Boraas,* 94 S. Ct. 1536 (1974).

2. THE PETITIONER IS BEING DEPRIVED OF EQUAL PROTECTION OF THE LAW.

As suggested by the illustration herein and as established by the maps in evidence, the land where the Middletown Shopping Center is situated is zoned C-3 while the immediately abutting zone (in which Petitioner's building is located) having the same frontage on Breiel Boulevard and the same 700 foot depth, and fronting commercial zones across Breiel Boulevard, is restricted and limited to C-2 highway-associated demand uses. The disparity in treatment afforded these two similarly situated areas is readily apparent by comparing the uses permitted in a C-2 zone with the uses permitted in a C-3 zone.

---

cuts on Grand Avenue (a major thoroughfare) to either Petitioner's property or Middletown Shopping Center.

The two districts are absolutely alike: they are both zoned commercial; they abut one another; they front to the same extent on the same streets; and, they are adjacent to other commercially zoned properties. There is no reason, reasonably related to the public health, safety, morals or general welfare, why a fabric center is lawful in the Middletown Shopping Center, but prohibited on the other side of Grand Avenue, although the latter premises are also zoned commercial.[6]

It is elementary that a zoning ordinance must operate equally upon all persons and properties which are, with regard to the purpose of the ordinance, similarly circumstanced. If various parcels of real estate are subject to different burdens, or are granted different immunities, such difference in treatment must be founded upon a reason which was a genuine pertinence to the end which the ordinance is designed to attain.

The trial court, in a well-reasoned opinion, considered this point and found as follows:

> "We fail to find any reason which could be said to be reasonably related to the public health, safety, morals and general welfare for distinguishing between the uses permitted in C-2 and C-3 districts where such distinction is based upon 'highway-associated demand.' "

Accordingly, Judge Cramer concluded:

> "We do find after what we believe to be a full and fair consideration of all the evidence that the C-2

[6] It is essential in this case to bear in mind that this matter does not involve encroachment of commerce into residential areas, which so frequently gives rise to zoning litigation. Here, the City has determined that this area, including Petitioner's property, is suitable and appropriate for extensive commercial development, and has zoned the same accordingly.

> restriction of the [Petitioner's] property to C-2 uses is unreasonable, discriminatory and constitutes a denial of equal protection of law."

Therefore, the Petitioner urges that consideration of this "equal protection" issue is appropriate because of its substantial nature and because of the erroneous reversal of the intermediate courts which overturned the findings of the trial court.

3. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING WHETHER A CITY'S SUDDEN AND UNEXPLAINED REVERSAL OF POSITION, AFTER SUBSTANTIAL FINANCIAL COMMITMENTS WERE EXPENDED IN RELIANCE ON THE EARLIER POSITION, CONSTITUTES AN ABUSE OF THE EXERCISE OF ITS POLICE POWER IN VIOLATION OF THE FOURTEENTH AMENDMENT.

After the Petitioner had (1) purchased the land, (2) signed substantial architectural and construction contracts, (3) secured from the City a certificate of zoning compliance which can be issued only if the intended uses conform to the zoning ordinance, (4) obtained from the City a building permit and an amended building permit, (5) executed long-term leases, and (6) started construction which was about 90% completed, then, after all of the above, the City filed an injunction seeking to prohibit the intended uses.

As this Honorable Court stated in *Dobbins* v. *Los Angeles*, 195 U.S. 223, 239 (1904):

> "Being the owner of the land and having partially erected the works, the plaintiff in error had acquired property rights, and was entitled to protection against unconstitutional encroachment which would have the effect to deprive her of her property without due process of law."

The Petitioner submits that it falls into the same predicament as existed in *Dobbins* or as existed in *City Railway Co.* v. *Citizens' Street Railroad Co.*, 166 U.S. 557 (1897). Yet both the trial court and the intermediate courts concluded, erroneously it is submitted, that estoppel did not run against the City. The straw upon which the courts relied was Section 1173.02 (a) of the City's Zoning Ordinance which provides in relevant part:

> ". . . Any permit or license issued in conflict with the provisions of this Zoning Ordinance, shall be null and void and of no effect whatever."

The Petitioner suggests that it is fundamentally unfair to confer any validity to this Section. If this type of statute is countenanced, the validity of the entire administrative process is dissipated, if not abrogated. Any applicant obtains a permit at his peril, executes leases at his peril, signs financial commitments at his peril, opens for business at his peril, *ad infinitum*. At any later date, the City can renounce its earlier actions, with the concomitant effect of unconstitutionally depriving the applicant of property rights and, perhaps, driving him to financial ruin.

For a city to act as it did is fundamentally unfair and constitutes, as this Honorable Court noted in *Dobbins*, an "arbitrary exercise of the police power which amounts to a taking of property without due process of law and an impairment of property rights protected by the 14th Amendment to the Federal Constitution." 195 U.S. at

241. *See also Evansville* v. *Gaseteria,* 51 F.2d 232 (7th Cir. 1931); *District of Columbia* v. *Cahill,* 54 F.2d 453 (App. D.C. 1931).

Accordingly, because of the nature of the decisions below, the recurring potential of the issue and its general importance, the Petitioner urges the appropriateness of review by this Honorable Court. Note that the Petitioner is not requesting this Honorable Court to act as a zoning board of appeals. *Belle Terre* v. *Boraas,* 94 S. Ct. 1536 (1974) (dissenting opinion). However, the Petitioner is requesting review of a denial and deprivation of a fundamental constitutional right.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Ohio.

Respectfully submitted,

MERLE F. WILBERDING
600 IBM Building
Dayton, Ohio 45402
Counsel for Petitioners

APPENDIX

ORDINANCES

CHAPTER 1139

"C-1" Convenience Commercial District

1139.01 Intent.
1139.02 Principal uses permitted.
1139.03 Conditional uses permitted.
1139.04 Accessory uses permitted.
1139.05 Required conditions.
1139.06 Off-Street parking and loading regulations.
1139.07 Height regulations.
1139.08 Lot area and yard requirements.
1139.09 Maximum floor area.

Cross References

Shopping groups — see P. & Z. 1153.02
Office groups — see P. & Z. 1153.03

1139.01 INTENT.

It is the intent of the "C-1" Convenience Commercial District to have low-intensity, enclosed uses providing primarily convenience goods and personal services for persons residing in the adjacent residential areas. (Ord. 4886. Passed 12-27-68.)

1139.02 PRINCIPAL USES PERMITTED.

No structure or land shall be used for any other than one or more of the following commercial or service purposes:

(a) **Retail Sales.** Bakery shops with baking for sale on the premises, beer and wine carryouts, candy shops, delicatessens, drug stores, groceries and markets, ice cream and dairy product stores, magazine and newsstands, meat, fruit and vegetable markets and tobacco shops;

(b) **Personal and Business Services.** Barber and beauty shops, dry cleaning and laundry pick-up stations provided that no cleaning is done on the premises, funeral homes and mortuaries including those with emergency ambulance service, laundromats, professional offices, shoe repair, talent instruction, branch banks and savings and loan institutions, and real estate and insurance offices;

(c) **Eating and Drink Places.** Ice cream parlors and soda fountains, pizza houses, tea rooms, restaurants and lunch rooms, but specifically excluding drive-in restaurants of any type; liquor consumption on the premises; and dancing, live music or entertainment of any kind shall be prohibited;

(d) **Automotive Services.** Service stations and repair, including minor repair only;

(e) **Shopping Groups.** Shopping groups, as set forth in Chapter 1153;

(f) **Other Uses.** Any other retail business or service which is determined by the Planning Commission to be of the same general character as the above permitted uses, except those which are first permitted as a conditional use in this District, or prohibited or first permitted in any other commercial, office or industrial district, or, in the judgment of the Planning Commission would likely be objectionable in a "C-1" District. (Ord. 4886. Passed 12-27-68.)

1139.03 CONDITIONAL USES PERMITTED.

The following uses shall be permitted only if specifically authorized by the Planning Commission in accordance with the procedure set forth in Chapter 1171:

Clubs and Fraternities. Clubs, fraternities, sororities, lodges and meeting places for other similar organizations. (Ord. 4886. Passed 12-27-68.)

1139.04 ACCESSORY USES PERMITTED.

Structures and uses customarily incidental to any of the aforesaid permitted uses and occupying the same lot or tract shall be permitted, including signs which shall be subject to the standards and requirements of Chapter 1165. (Ord. 4886. Passed 12-27-68.)

1139.05 REQUIRED CONDITIONS.

All uses permitted herein shall be subject to the following conditions:

(a) **Enclosure.** All business, services or processing shall be conducted wholly within an enclosed building except for the sale of fuel, lubricants and radiator fluids at service stations, incidental or seasonal sidewalk sales and off-street parking and loading.

(b) **New Merchandise.** Goods for sale shall consist primarily of new merchandise.

(c) **Production for Sale at Retail.** All products produced on the premises, whether primary or incidental, shall be sold at retail primarily on the premises where produced.

(d) **Equipment Installation.** All equipment or machinery, whether hand or power-operated, used in the

servicing of the building or in the processing of goods therein, shall be installed entirely within a building enclosure, and shall be so located, isolated or sound-insulated in such a manner that any noise generated thereby is not audible beyond the limits of the lot or property line where used.

(e) **Performance Standards.** See the requirements of Chapter 1167.

(f) **Hours.** Operation of any use in a "C-1" District shall be prohibited from 11:00 p.m. to 6:00 a.m., if within 500 feet of any "D" District. (Ord. 4886. Passed 12-27-68.)

1139.06 OFF-STREET PARKING AND LOADING REGULATIONS.

Off-street parking and loading spaces shall be provided as required in Chapter 1163. (Ord. 4886. Passed 12-27-68.)

1139.07 HEIGHT REGULATIONS.

No building shall exceed two stories or thirty feet in height, whichever is greater, and no accessory structure shall exceed one story or twenty feet in height, whichever is greater. (Ord. 4886. Passed 12-27-68.)

1139.08 LOT AREA AND YARD REQUIREMENTS.

The following lot area requirements shall apply:

"C-1" Convenience Commercial District

Minimum lot area	5,000 sq. ft.
Front yard setback	25 ft.
Rear yard	25 ft. where adjoining "P" or "D" District; otherwise 15 ft.
Side yards	15 ft. where adjoining "P" or "D" District; otherwise none.

(Ord. 4886. Passed 12-27-68.)

1139.09 MAXIMUM FLOOR AREA.

No single store or use permitted above shall occupy a net retail floor sales area greater than 15,000 square feet. Retail sales floor area shall not include storage or service areas, lavatories, preparation or utility rooms and other such areas not specifically used for the display of merchandise. (Ord. 4886. Passed 12-27-68.)

CHAPTER 1141

"C-2" Roadside Commercial District

1141.01 Intent.
1141.02 Principal uses permitted.
1141.03 Conditional uses permitted.
1141.04 Accessory uses permitted.
1141.05 Required conditions.
1141.06 Off-street parking and loading.
1141.07 Height regulations.
1141.08 Lot area and yard requirements
1141.09 Maximum floor area.

Cross References

Seasonal or sidewalk displays – see P. & Z. 1125.14
Shopping groups – see P. & Z. 1153.02
Office groups – see P. & Z. 1153.03

1141.01 INTENT.

It is the intent of the "C-2" Roadside Commercial District to have low-intensity, open and enclosed uses catering primarily to highway-associated demands. (Ord. 4886. Passed 12-27-68.)

1141.02 PRINCIPAL USES PERMITTED.

No structure or land shall be used for any other than one or more of the following purposes:

(a) **Retail Sales.** Any use permitted in a "C-1" District, building materials, new and used, farm produce stands, farm implements, mobile home sales, nurseries, including greenhouses, trailer sales, beer and wine carryouts, and pottery and souvenir shops;

(b) **Personal and Business Services.** Any use permitted in a "C-1" District, business and professional offices, lawn and garden equipment rental and service, appliance and business machine service, motels, animal clinics and kennels (in accordance with the provisions of Chapter 1165), indoor and outdoor motion picture theaters, post office branches, and short-term or transient mobile home parks or courts;

(c) **Eating and Drinking Places.** Restaurants, bars and cafes, including those where liquor is consumed on the premises and live entertainment and dancing is provided, drive-in restaurants and refreshment stands, truck stops, banquet halls, and private clubs; (Ord. 4886. Passed 12-27-68.)

(d) **Automotive Services.** Automobile service stations, auto and truck repair, auto and truck sales, new and used, convertible top and seat cover shops, auto parts sales, new and used, tire service, vehicle rental and storage, the sale and repair of bicycles and motorcycles and automatic car wash establishments as regulated in Section 1165.12; (Ord. 5531. Passed 7-18-72.)

(e) **Shopping Groups.** Shopping groups as set forth in Chapter 1153;

(f) **Other Uses.** Any other business or service which is determined by the Planning Commission to be of the same general character as the above permitted uses, and not first permitted in a "C-3", "C-4" or "CBD" Commercial District or in any Industrial District. (Ord. 4886. Passed 12-27-68.)

1141.03 CONDITIONAL USES PERMITTED.

Any one of the following uses may be permitted when authorized by the Planning Commission in accordance with the procedures set forth in Chapter 1171:

(a) **Outdoor Advertising.** Outdoor advertising in accordance with the provisions of Chapter 1165;

(b) **Commercial Recreation.** Bowling and billiard establishments; amusement parks, circus or tent show grounds and minature golf courses, located at least 500 feet from any "D" District; race courses of any type, including horse race tracks and stables and tracks for self-propelled vehicles, located at least 1,000 feet from any "D" District; and other facilities of a similar commercial recreational nature;

(c) **Industrial Uses.** Any use principally permitted in an "I-1" District;

(d) **Railroad.** Spur and yard tracks;

(e) **Clubs and Fraternities.** Clubs, fraternities, sororities, lodges and meeting places for similar organizations. (Ord. 4886. Passed 12-27-68.)

1141.04 ACCESSORY USES PERMITTED.

Structures and uses customarily incidental to any of the aforesaid permitted uses and occupying the same lot or tract, including signs which shall be subject to the standards and requirements of Chapter 1165, shall be permitted. (Ord. 4886. Passed 12-27-68.)

1141.05 REQUIRED CONDITIONS.

All uses permitted herein shall be subject to the following conditions:

(a) **Enclosure.** If any business, service, repair, processing, storage or display not conducted wholly within an enclosed building, except for the sale of fuel, lubricants and radiator fluids at service stations, incidental or seasonal sidewalk sales and off-street parking and loading, adjoins

in the rear or on the sides either directly or across an alley any "D" or "P" District, it shall be enclosed by a solid fence or wall at least six feet in height. The premises, including buildings and accessory structures, fences, walls, pavement and landscaping shall be kept in sightly condition and proper repair.

(b) **Production for Sale at Retail.** All products produced on the premises, whether primary or incidental, shall be sold at retail primarily on the premises where produced.

(c) **Equipment Installation.** All equipment or machinery, whether hand or power-operated, used in the servicing of the building or in the processing of goods therein shall be installed entirely within a building or enclosure, and shall be so located, isolated or sound-insulated in such a manner that any noise generated thereby is not audible beyond the limits of the lot or property line where used.

(d) **Performance Standards.** See the requirements of Chapter 1167. (Ord. 4886. Passed 12-27-68.)

1141.06 OFF-STREET PARKING AND LOADING.

Each use shall provide adequate off-street parking and loading facilities in accordance with the provisions of Chapter 1163. (Ord. 4886. Passed 12-27-68.)

1141.07 HEIGHT REGULATIONS.

No principal structure shall exceed three stories or forty-five feet in height, whichever is greater, and no accessory structure shall exceed one story or twenty feet in height, whichever is greater, except as modified by Chapter 1155. (Ord. 4886. Passed 12-27-68.)

1141.08 LOT AREA AND YARD REQUIREMENTS.

The following lot area and yard requirements shall apply:

"C-2" Roadside Commercial District

Minimum lot area	10,000 sq. ft.
Front yard setback	35 ft.
Rear yard	30 ft. when adjacent to any "P" or "D" District; 15 ft. otherwise for utility easement.
Side yard	20 ft. when adjacent to any "P" or "D" District; 10 ft. otherwise for utility easement.

(Ord. 4886. Passed 12-27-68.)

1141.09 MAXIMUM FLOOR AREA.

No single store or use permitted above shall occupy a net retail sales floor area greater than 25,000 square feet. Retail sales floor area shall not include storage or service areas, lavatories, preparation or utility rooms and other such areas not specifically used for the display of merchandise. (Ord. 4886. Passed 12-27-68.)

CHAPTER 1143

"C-3" Community Commercial District

1143.01 Intent.
1143.02 Principal uses permitted.
1143.03 Conditional uses permitted.
1143.04 Accessory uses permitted.
1143.05 Required conditions.
1143.06 Off-street parking and loading regulations.
1143.07 Height regulations.
1143.08 Lot area and yard requirements.

Cross References

Seasonal or sidewalk displays – see P. & Z. 1125.14
Shopping groups – see P. & Z. 1153.02
Office groups – see P. & Z. 1153.03

1143.01 INTENT.

It is the intent of the "C-3" Community Commercial District to have high-intensity enclosed uses providing both convenience goods and major shopping needs for the entire City or a major portion thereof. (Ord. 4886. Passed 12-27-68.)

1143.02 PRINCIPAL USES PERMITTED.

No structure or land shall be used for any other than one or more of the following purposes:

(a) **Retail Sales.** Any principal permitted use in a "C-1" District, antique shops, appliance sales, apparel sales, novelty and gift shops, department stores, discount stores, garden supply stores, hardware and paint stores, music and record shops, shoe stores, mail order houses, furniture

stores, hobby shops, jewelry stores, milinery shops, toy stores, variety stores, florists, excluding greenhouses, sporting foods and package liquor;

(b) **Personal and Business Services.** Any principal permitted use in a "C-1" District, business and professional offices of any size including medical clinics, photography studios, reducing or health salons, power lawn and garden equipment rental and service, appliance service, post office branches and indoor motion picture theaters;

(c) **Eating and Drinking Places.** Any principal permitted use in a "C-1" District, clubs and restaurants including those serving liquor and providing live music and dancing; no drive-in restaurants of any type shall be permitted;

(d) **Commercial Recreation.** Bowling and billiard establishments;

(e) **Automotive Services.** Any conditionally permitted use in a "C-1" District, automatic car wash, seat cover and convertible top sales and installation and auto parts stores;

(f) **Shopping Groups.** Shopping groups, as set forth in Chapter 1153;

(g) **Other Uses.** Any other retail business or service which is determined by the Planning Commission to be of the same general character as the above permitted uses, and which is not first permitted as a conditional use in this District or prohibited or first permitted in any "C-4", "CBD" of "P" District. (Ord. 4886. Passed 12-27-68.)

1143.03 CONDITIONAL USES PERMITTED.

Any one of the following uses may be permitted when authorized by the Planning Commission in accordance with the provisions set forth in Chapter 1171:

Clubs and Fraternities. Clubs, fraternities, sororities, lodges and meeting places for similar organizations. (Ord. 4886. Passed 12-27-68.)

1143.04 ACCESSORY USES PERMITTED.

Structures and uses customarily incidental to any of the aforesaid permitted uses and occupying the same lot or tract, including signs which shall be subject to the standards and requirements of Chapter 1165, shall be permitted. (Ord. 4886. Passed 12-27-68.)

1143.05 REQUIRED CONDITIONS.

All uses permitted herein shall be subject to the following conditions:

(a) **Enclosure.** All business, services or processing shall be conducted wholly within an enclosed building except for the sale of fuel, lubricants and radiator fluids at service stations, incidental or seasonal sidewalk sales, and off-street parking and loading.

(b) **New Merchandise.** Goods for sale shall consist primarily of new merchandise, except for bona fide antiques.

(c) **Production for Sale at Retail.** All products produced on the premises, whether primary or incidental, shall be sold at retail primarily on the premises where produced.

(d) **Equipment Installation.** All equipment or machinery, whether hand or power-operated, used in the servicing of the building or in the processing of goods therein shall be installed entirely within a building or enclosure, and shall be so located, isolated or sound-insulated in such a manner that any noise generated thereby

is not audible beyond the limits of the lot or property line where used.

(e) **Performance Standards.** See the requirements of Chapter 1167.

(f) **Sound.** Outdoor amplifiers for music, advertising or paging shall be located, directed or shielded so as to prevent sound transmission into any "D" or "P" District. (Ord. 4886. Passed 12-27-68.)

1143.06 OFF-STREET PARKING AND LOADING REGULATIONS.

Off-street parking and loading spaces shall be provided as required in Chapter 1163. (Ord. 4886. Passed 12-27-68.)

1143.07 HEIGHT REGULATIONS.

No building shall exceed two stories or thirty feet in height, whichever is greater, and no accessory structure shall exceed one story or twenty feet in height, whichever is greater. (Ord. 4886. Passed 12-27-68.)

1143.08 LOT AREA AND YARD REGUIREMENTS.

The following lot area and yard requirements shall apply:

"C-3" Community Commercial District

Minimum lot area	20,000 sq. ft.
Front yard setback	50 ft.
Rear yard	30ft. when adjacent to any "D" or "P" District; 15 ft. otherwise for utility easement.
Side yard	20 ft. when adjacent to any "D" or "P" District; 10 ft. otherwise for utility easement.

(Ord. 4886. Passed 12-27-68.)

CHAPTER 1173

Administration and Enforcement

1173.01 Zoning Administrator.
1173.02 Enforcement by Zoning Administrator.
1173.03 Certificate of Zoning Compliance.
1173.04 Building permit required.
1173.05 Certificate of Occupancy.
1173.06 Violations of Zoning Ordinance.
1173.07 Penalty.

Cross References

Certificate issuance in a development or modified use – see P. & Z. 1157.05
Certificate issuance for conditional use – see P. & Z. 1171.01(g)
Building permit fees – see BLDG. 1501.06
Driveways – see BLDG. 1506.01 et seq.

1173.01 ZONING ADMINISTRATOR.

The City Manager shall appoint a Zoning Administrator from within the Department of Community Development. (Ord. 4886. Passed 12-27-68.)

1173.02 ENFORCEMENT BY ZONING ADMINISTRATOR.

It shall be the duty of the Zoning Administrator to enforce the regulations of this Zoning Ordinance in accordance with the administrative provisions herein.

(a) **Compliance of Other City Departments.** All departments, officials and public employees of the City vested with the duty or authority to issue permits or licenses shall comply with the provisions of this Zoning Ordinance and

shall issue no permit or license for any use, building or purpose in conflict with the provisions of this Zoning Ordinance. Any permit or license, issued in conflict with the provisions of this Zoning Ordinance, shall be null and void and of no effect whatever; and no utility or other public service shall be provided to any property used in violation of this or any other applicable ordinance of the City.

(b) **Powers and Duties.** The Zoning Administrator shall issue Certificates of Zoning Compliance in accordance with requirements set forth herein, and shall take any other action authorized by this Zoning Ordinance to insure compliance with, or prevent violation of its provisions. (Ord. 4886. Passed 12-27-68.)

1173.03 CERTIFICATE OF ZONING COMPLIANCE.

No land shall be used and no permits for excavation or construction shall be issued by the Commissioner of Inspection, other than alterations or remodeling not affecting the size, character or use of a structure, until a plan showing such intended use and construction of structures or alterations thereof has been submitted to the Zoning Administrator for his review, and a Certificate of Zoning Compliance issued. Such Certificate shall show that the proposed building or premises, or parts thereof, and the proposed use thereof, are in conformance with all provisions of this Zoning Ordinance.

(a) **Procedure for Certificate of Zoning Compliance.** To obtain a Certificate of Zoning Compliance, an applicant shall submit plans as required in Section 1173.03(b) to the Office of the Zoning Administrator in such number as may be specified by such Administrator. Within seven calendar days, the Zoning Administrator shall review such plans for conformance in all respects to the Zoning Ordi-

nance, Curb-Cut Ordinance No. 4682 and other applicable ordinances, and shall approve, amend or reject with reasons for rejection stated. If such plans are approved, or approved as amended, certification of zoning compliance shall be affixed thereto and one copy returned to the applicant.

(b) **Plan Requirements.** Plans shall show the exact shape and dimensions of the lot or tract proposed to be built upon based on an actual survey. Such plans shall also show the exact location, size and height of the building or structure to be erected or altered, all building facade elevations, floor plans, and the existing and intended use for each building or part thereof, the number of dwelling units contained in such building, and such other information with regard to the lot or neighboring lots as may be necessary to determine and provide for the enforcement of this Zoning Ordinance. At the request of either the Zoning Administrator or the Commissioner of Inspection, the location of any proposed building or structure, or part thereof, shall be staked out on the ground before any Certificate of Zoning Compliance or Building Permit is issued. (Ord. 4886. Passed 12-27-68.)

1173.04 BUILDING PERMIT REQUIRED.

No building or other structure shall be erected, moved or added to, or structurally altered without a permit therefor, issued by the Commissioner of Inspection. No building permit shall be issued unless the proposed plans are in conformity with the provisions of the Zoning Ordinance as attested to by the attachment of a Certificate of Zoning Compliance.

(a) **Procedure for Building Permit.** To obtain a building permit, an applicant shall submit the Certificate of

Zoning Compilance and copies of proposed plans to the Commissioner of Inspection in such number and detail as may be specified by the Commissioner of Inspection.

(b) **Action by Commissioner of Inspection.** Within thirty calendar days from acceptance of plans for review, the Commissioner of Inspection shall review such plans for conformance with all provisions of the Building Code and approve, approve with amendments or refuse to approve with reasons for such refusal so stated. If plans are approved, building permits for construction in conformance with such plans shall be issued upon payment of appropriate fees. (Ord. 4886. Passed 12-27-68.)

1173.05 CERTIFICATE OF OCCUPANCY.

It shall be unlawful to use or occupy or permit the use or occupancy of any building or premises or part thereof, hereafter created, erected, changed, converted or enlarged wholly or in part, in its use or structure until a Certificate of Occupancy has been issued by the Commissioner of Inspection. Such Certificate shall only be issued after the final construction inspection has been conducted and all water, sanitary, electrical and/or heating systems are determined by the Commissioner of Inspection to be operable. A copy of the Certificate of Occupancy shall be forwarded to the Zoning Administrator upon issuance to the applicant.

A temporary Certificate of Occupancy may be issued by the Commissioner of Inspection for a period not exceeding twelve months during alterations, for partial occupancy of a building pending its completion, provided that such temporary Certificate may require such conditions and safeguards as will protect the safety of the occupants and the public. In no case shall such a temporary

Certificate be issued for a new structure. (Ord. 4886. Passed 12-27-68.)

1173.06 VIOLATIONS OF ZONING ORDINANCES.

(a) **Action of Zoning Administrator.** If the Zoning Administrator finds that any provisions of this Zoning Ordinance are being violated, he shall notify in writing the person responsible for such violations, indicating the nature of such violations and ordering the action necessary to provide compliance with this Zoning Ordinance.

(b) **Violator to Conform.** Any person determined to be in violation of this Zoning Ordinance shall take necessary action to bring the violation into compliance within a period of thirty days after the date of written notification by the Zoning Administrator, and such violation shall be corrected within ninety days of such notice. In any instance where the violation is not brought into conformance within the time provided set forth herein, it shall be the duty of the Zoning Administrator to request legal action as provided in Section 1173.06(c).

(c) **Action of Director of Law.** In case any building or structure is, or is intended to be erected, constructed, reconstructed, altered or converted, or any building, structure or premises is, or is intended to be used in violation of, or contrary to the provisions of this Zoning Ordinance, the Director of Law shall, promptly upon a violation of this Zoning Ordinance, institute injunction or other appropriate action to prevent or enjoin construction, reconstruction, alteration, conversion, maintenance or use. Such action may be instituted by the owner of any contiguous or neighboring property as provided in Ohio R.C. 713.13. (Ord. 4886. Passed 12-27-68.)

1173.07 PENALTY.

Whoever violates, disobeys, omits, neglects or refuses to comply with any of the provisions of the Zoning Ordinance shall be fined not more than one hundred dollars ($100.00) for each violation. Each and every day that a violation continues shall constitute a separate offense. (Ord. 4886. Passed 12-27-68.)

COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

No. CV82-10-0677

CITY OF MIDDLETOWN, OHIO,
Plaintiff,

vs.

KITTYHAWK, LTD.,
a limited partnership, et al.,
Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND OPINION

November 28, 1972

CRAMER, J.

This cause is now before the Court for final disposition upon the merits, it having been submitted upon the evidence, memoranda and oral arguments of counsel.

This somewhat brief opinion – considering the complex and difficult legal questions involved in this case – is by no means to be taken as a measure – for it is not – of the vast amount of time spent in considering the evidence, in studying memoranda, oral arguments and in researching the authorities cited and independently found by the Court which in any manner assisted us in resolving the issues presented.

The brevity results from our desire to record the Court's decision and finding as quickly as possible. A citation of

the numerous authorities consulted and considered and lengthy quotations therefrom are therefore purposely omitted.

Briefly stated, we find the facts to be as follows: Kitty-hawk, Ltd., one of the defendants herein and the owner of the real estate in question, hereinafter referred to as the owner, had prepared and submitted detailed plans for the building of a commercial structure on part of lot 13118 in the City of Middletown, Butler County, Ohio, to the Zoning Administrator of the City of Middletown, on July 5, 1972. The owner sought to obtain a Certificate of Zoning Compliance — a prerequisite to the issuance of a building permit. The plans called for a building which would house a supermarket, drug store, a fabric center and a tile and carpet store. On the same day an instrument designated a Certificate of Zoning Compliance was issued.

Such Certificate stated the proposed use of the building as "Commercial Shopping Center" and thereon is stated that the "proposed use is principally permitted and that the general land use plan is not in conflict with plans and ordinances." It is also certified therein that the plans submitted were received and "found to be in conformance with the Zoning Ordinance in all respects."

Such certificate was issued in compliance with Sect. 1173.03 of the Zoning Ordinance. The property of the owner is in a C-2 Zone (Roadside Commercial District) which, under Sect. 1141.01 of the Ordinance is confined to "low intensity, open and enclosed uses catering primarily to highway-associated demands."

The building plans first approved had thereon the names of an A & P store, drug store, fabric shop and a tile and carpet store. Later, the owner obtained approval of amended building plans which showed space for Esco Distributing Company (one of the defendants herein), an A & P store,

and a fabric shop. The drug store and the tile and carpet store had been deleted from the plans. The amended plans were approved by the Commissioner of Inspection without any further certificate of zoning compliance and building permits for those stores issued.

Thereafter, the owner contracted for the construction of the buildings. Construction commenced and leases were entered into with lessees involving very substantial rentals running into thousands of dollars. On October 27, 1972, when the building was approximately 90 percent completed according to plans, the City of Middletown, Ohio, brought this action wherein it seeks to permanently enjoin the use of said building by the owner and two of the lessees — namely, the Esco Company which intends to operate a retail sales and catalogue store and the Mills Fabrics of Memphis, Tenn., which intends to operate a fabric shop or center.

The injunction is sought by the City of Middletown and the intervening plaintiffs on the ground that the lessees will be engaging in uses in the operation of their respective businesses which are prohibited in the C-2 zone in which they are situated. It being claimed that such uses under the Zoning Ordinance are permitted only in a C-3 zone (Community Commercial District) a C-4 zone (General Commercial District) or a CB-D zone (Central Business District) as defined in the Ordinance.

The defendants assert that the relief against them being sought must be denied because:

(1) The City is estopped from enjoining the proposed uses of the owner's building.

(2) The proposed uses by the defendants do not violate C-2 zoning.

(3) The restriction of defendants' property to C-2 uses is unreasonable and is a denial of equal protection of the law in that similarly situated property is not so restricted.

(4) The Middletown Ordinance in so far as it attempts to distinguish between C-2 and C-3 uses is void, as such distinction is unreasonable and discriminatory and there is no plausible and substantial connection between such distinction and the public interest which the Ordinance is designed to serve.

Based upon the facts hereinbefore recited our conclusions of law are as follow:

Sect. 1173.02 (a) of the Zoning Ordinance provides that "any permit or license, issued in conflict with the provisions of this Zoning Ordinance shall be null and void and of no effect whatever. . . ."

Therefore, even if we were to assume that the Certificate of Zoning Compliance and the building permits were granted for the uses intended by defendants, still the acts of the City officials who committed them would be invalidated by virtue of the Ordinance.

Furthermore, though a municipality may in some instances be estopped by the act of its officers if done within the scope of and in the course of their employment, estoppel does not arise if the acts done are in violation of law.

The doctrine of estoppel is applicable to municipal corporations where they have the power to act or contract, but is not applicable where the subject matter of the contract is ultra vires, illegal or malum prohibitum. See annotation in Vol. 1 A.L.R. 2d commencing at Pg. 338. Also Vol. 20 O. Jur. 2d Sects. 80 and 81, Pgs. 565 to 569.

The City, in our opinion, is not estopped by reason of any of the acts of its officials, as claimed by the defendants.

It is claimed that the proposed retail sales and catalogue store and fabric center are not incompatible with the C-2 district in which the premises here in question are located.

Sect. 1141.01 of the Ordinance provides that C-2 uses are those "catering primarily to highway-associated demands." The Ordinance then sets forth a number of specific uses which are deemed to come within the intent clause which is found in 1141.01. In Sect. 1141.02 (a) it is provided, under "Retail Sales" that any use is permitted which is allowed in a C-1 district. Thus, a rather substantial overlapping of the kind of goods and articles which may be sold at retail in a C-2 district occurs in respect to the kind of goods and articles which are first permitted in a C-3 zone.

However, we do not consider this situation in and of itself sufficient to permit defendants to use their premises from which to conduct retail sales, which can be construed to be in violation of C-2 zoning. We will, however, consider the evidence in this respect in connection with our determination of whether the restriction imposed by C-2 zoning upon the defendants' premises is discriminatory, arbitrary or unreasonable, bearing in mind that ordinances which impose restrictions upon the use of private property will be strictly construed and their scope is not to be extended to include limitations not therein clearly prescribed.

It is to be noted that under Sect. 1139.02 of the Ordinance many uses for commercial or service purposes are set forth which are permitted in the C-1 zone. Such uses are, of course, permitted in a C-2 zone producing thereby, in a number of instances, not only overlapping but also duplications.

The evidence shows that the land where the Middletown Shopping Center is situated is zoned C-3, Community Commercial District, while the abutting zone where de-

fendants' building is located is restricted and limited to C-2, Roadside Commercial Uses. These two areas are to a great extent given considerably different zoning treatment under the Ordinance.

Our question is whether such difference is reasonably related to the public health, safety, morals or general welfare.

We recognize, of course, that the City Commission of the City of Middletown, Ohio, the legislative authority of that city, is charged with the duty of determining the wisdom of zoning regulations and our judicial judgment is not to be substituted for the legislative judgment in any case in which the issue or matter is fairly debatable.

As hereinbefore stated, the two zoning areas C-2 and 3 are given very substantially different zoning treatment under the Ordinance. However, they bear substantial similarities.

The defendants' property fronts approximately 1100 feet on South Breiel Boulevard and 700 feet on Grand Avenue. The land west of Breiel Boulevard is zoned C-1 Convenience Commercial District, and C-2 Roadside Commercial District. To the south, the land is Roadside Commercial C-2 District and D-3, Medium Density Dwelling District and to the east, the adjacent property zoned D-4, High Density Dwelling.

The Middletown Shopping Center (C-3) abuts defendants' property on the north and has apparently the same frontage on Breiel Boulevard as the property on which defendants' building is located, and the same depth fronting approximately 700 feet on Grand Avenue. This faces C-1 and C-2 Districts across Breiel Boulevard though the residential district to the north and east are more restrictive being D-2, Low Density Dwelling District.

In other words, both these districts are zoned commercial, they abut each other, front to the same extent on the same streets and are adjacent to other commercially zoned properties.

However, the police power of a municipality exercised to regulate the use of land by the enactment of zoning ordinances must be exercised to promote the public health, safety, morals and general welfare. Also, in considering the validity of zoning regulations in their application to the use of the property affected, the courts must consider their reasonableness, since the zoning power does not extend to unreasonable or arbitrary interference with private property rights.

Zoning laws must be impartially applied as to all properties which are similarly situated.

If no benefit results to the public health, safety, morals or general welfare by prohibiting the proposed use of defendants' commercial property while permitting such or similar uses on adjacent commercial property then such prohibitory ordinance is void as being unreasonable, discriminatory, and further is in violation of their Constitutional right to equal protection of the law.

Of course, a municipality is not permitted under the guise of regulating business and segregating it to a particular district to regulate competition or to grant a monopoly to business establishments.

We fail to find any reason which could be said to be reasonably related to the public health, safety, morals and general welfare for distinguishing between the uses permitted in C-2 and C-3 districts wheer such distinction is based upon "highway associated demands."

In McQuillan on Municipal Corporations, 3rd edition, Vol. 8, Pg. 203, we find this statement:

> "The classification cannot prohibit or restrict certain uses and permit or not restrict other uses where there is no valid basis, reasonably related to the public health, safety, morals, welfare or other proper object of the police power and distinguish between them."

In other words, where a restriction is imposed upon one piece of property, as here, and not upon another piece (Middletown Shopping Center), the difference in treatment must be based upon a real and substantial relation to the ends sought by the imposition of the restriction.

The equal protection clause of the Fourteenth Amendment of the Federal Constitution requires that legislative classification be reasonable and not arbitrary and rest upon some ground of difference for a fair and substantial relation to object of legislation so that all persons similarly circumstanced shal be treated alike.

It is our opinion that the defendants may raise questions of whether the zoning restrictions affecting the use of their property are violative of their Constitutional rights without first resorting to or exhausting any administrative remedies provided either by the Ordinance itself or the law. The defendants claim that the Ordinance as it affects their property is unreasonable, confiscatory and denies them their Constitutional rights of due process of and equal protection of the law. This constitutes a proper and direct defense to the claim made by the plaintiff herein and, as such, is properly before this Court. The defendants seek no relief. It is the City of Middletown which seeks it. The defendants are not called upon to resort to any administrative relief such as appeal to a Board of Zoning Appeals or any other similar tribunal.

Under the Ordinance apparently the interpretation of what is meant by "highway-associated demands" is left to

an official such as the Zoning Administrator. No guidelines are set forth to direct him. Specifically setting forth the uses permitted in a C-2 zone, in our opinion, is not sufficient to constitute such guidelines.

Nowhere in the Ordinance is "highway-associated demands" specifically defined. However, many of the principal uses permitted under Sect. 1141.02 (C-2 District) under Retail Sales: personal and business services, eating and drinking places, automotive services, particularly considering that uses provided in C-1 areas as set forth in Sec. 1139.02 of the Ordinance have the effect of permitting uses that are a far cry from what one would ordinarily consider highway-associated demands.

It is also to be noted that Sect. 1141.02 Par. (3) permits premises in C-2 districts to be used in "shopping groups" as set forth in Chapter 1153. In 1153.02 (b) it is provided that any number of commercial structures may be placed on one or more tracts and any number of shops may be permitted in a single structure, with the approval of the Planning Commission. Even though this particular section states that no use shall be approved which is not permitted in the district wherein the project lies, nevertheless, in our opinion, this provision serves considerably to dilute substantially the meaning of highway-associated demands.

The foregoing provisions of the Ordinance herein referred to give the appearance that the zoning power of the City was being exercised from an arbitrary desire to resist the natural operation of economic laws which, of course, is prohibited.

We have the greatest difficulty in finding and, therefore, cannot and do not find that the uses permitted by virtue of the various sections of the Ordinance herein-

before referred to have the effect of prohibiting the uses these defendants expect to make of the structure here in question because they do not "cater primarily to highway-associated demands."

One of the prime requisites of an ordinance such as this is certainty, and a particular zoning enactment or provision thereof can be judicially declared to be inoperative and void for uncertainty, vagueness or indefiniteness. See Vol. 58, Am. Jur. Sect. 24, Zoning. To say the least, taking the applicable provisions of this Ordinance by their four corners, the term "highway-associated demands" in our opinion, is not only uncertain but vague and indefinite. We do not have here presented by the evidence such certainty or definiteness which must appear before the intended uses of these premises by these defendants are to be prohibited.

We do find after what we believe to be a full and fair consideration of all the evidence that the C-2 restriction of the defendants' property to C-2 uses is unreasonable, discriminatory and constitutes a denial of equal protection of law. We further find that the Zoning Ordinance, in so far as it attempts to distinguish between C-2 and C-3 uses affecting the premises here in question, is not designed to nor does it promote or have any relation to the public health, safety, morals and general welfare and is, therefore, void as to controlling or in any manner affecting the defendants' use of the property here in issue.

The relief sought and prayed for by the plaintiffs will be denied. The temporary restraining order and preliminary injunction heretofore issued by this Court will, of course, therefore be dissolved.

This opinion, findings of fact and conclusions of law were this day, November 28, 1972, journalized in the of-

fice of the Clerk of Courts, Butler County, Ohio, and copies thereof mailed to counsel.

.....
Judge

cc:

JEROME GOLDMAN
MR. JOHN R. KOVERMAN, JR.
MR. BARRY LEVY
GEORGE ELLIOTT
TILMON ELLISON

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
BUTLER COUNTY, OHIO

NO. CA 72-12-0080

CITY OF MIDDLETOWN,

Plaintiff-Appellant,

and

MIDDLETOWN SHOPPING CENTER, INC.

and

MANUEL D. MAYERSON,

Appellants-Intervenors,

vs.

KITTYHAWK, LTD.,
ESCO DISTRIBUTION CO.,

and

MILES FABRICS OF MEMPHIS, INC.,

Defendants-Appellees.

DECISION

(Filed January 21, 1974)

Mr. Tilmon A. Ellison, 2114 Central Avenue, Middletown, Ohio 45042, for Plaintiff-Appellant,

Messrs. Jerome Goldman, 911 First National Bank Building, Cincinnati, Ohio 45202, and C. Richard Greathouse, Jr., 207-8 Savings & Loan Building, Middletown, Ohio 45042, for Appellants-Intervenors,

Messrs. George H. Elliott, 1601 First Avenue, Middletown, Ohio 45042; Barry J. Levey, 403 First National

Bank Building, Middletown, Ohio 45042; and John R. Koverman, Jr., 843 Third National Building, Dayton, Ohio 45402, for Defendants-Appellees.

PER CURIAM.

This cause came on to be heard on an appeal on questions of law, transcript of the docket and journal entries and original papers from the Court of Common Pleas, Butler County, transcript of the proceedings, assignments of error, briefs and arguments of counsel.

On July 5, 1972, Kittyhawk, Ltd., one of the appellees herein and owner of the subject real estate, submitted to the zoning administrator of the appellant, City of Middletown, hereinafter referred to as City, detailed plans for the building of a commercial structure on part of Lot No. 13118 in said City. The plans called for a building which would house a supermarket, drug store, fabric center, and a tile and carpet store. Subsequent thereto and on the same date, the zoning administrator issued a Certificate of Zoning Compliance which stated the proposed uses of the subject building as "Commercial Shopping Center" and that the "proposed use is principally permitted and that the general land use plan is not in conflict with plans and ordinances." It was also certified therein that the plans submitted were "found to be in conformance with the Zoning Ordinance in all respects"; however, no particular use was specified therein, as required by Section 1173.03 of the City's zoning ordinance.

Appellee Kittyhawk, Ltd., then presented this Certificate of Zoning Compliance to the City's commissioner of inspection who issued four building permits: one each for the supermarket, drug store, fabric center, and tile and carpet store. Subsequently, the drug store and the tile and carpet store decided not to locate their operation in the subject building.

On July 21, 1972, appellee Kittyhawk, Ltd., entered into a lease with appellee Esco Distributing Company, under which Esco would operate a retail sales and catalog store in the subject building. Amended plans, which combined the two units originally intended for the drug store and the carpet store into one unit to accomodate the proposed Esco Store, were submitted to the commissioner of inspection, who issued a building permit for the plans as amended.

On October 27, 1972, the City filed a complaint in the Court of Common Pleas, Butler County, wherein it sought to permanently enjoin the use of the subject building for a retail sales and catalog store and fabric center. Pursuant to the City's motion, the trial court issued a temporary restraining order on the same date whereby it enjoined and restrained the use of the subject building as a retail discount and catalog mailorder store and as a retail fabric store until said property is rezoned to a zoning classification permitting such uses or until permits are issued by the City Board of Zoning Appeals approving such uses.

On November 2, 1972, appellees filed a motion to vacate the temporary restraining order on the grounds that the City was estopped from enjoining the proposed uses and that the City zoning ordinance, insofar as it purports to prohibit the proposed uses on the subject property, is "unreasonable, arbitrary, confiscatory and constitutes a taking of defendant's property without due process of law and is a denial to defendants of the equal protection of the law, both as guaranteed by the Constitutions of the United States and State of Ohio."

Commencing November 2, 1972, the cause was heard on its merits for a permanent injunction. Thereafter, on November 17, 1972, the trial court permitted Middletown

Shopping Center, Inc., and Manuel D. Mayerson to intervene in said cause.

On November 28, 1972, the trial court ruled that the City was not estopped from enforcing its zoning ordinance, but denied the injunctive relief sought by the City and held that the "C-2 restriction of the defendants' property to C-2 uses is unreasonable, discriminatory, and constitutes a denial of equal protection of the law." The court further held that the zoning ordinance, "insofar as it attempts to distinguish between C-2 and C-3 uses affecting the premises here in question, is not designed to nor does it promote or have any relation to the public health, safety, morals and general welfare and is, therefore, void as to controlling or in any manner affecting the defendants' use of the property here in issue." It is from this judgment that appellant City and appellant-intervenors present this appeal.

Appellants present five assignments of error. Appellants claim in their first assignment of error that "the trial court erred in its findings of fact in that they are not supported by any evidence". Appellants specifically refer to page 7a of the trial court's "Findings of Fact, Conclusions of Law and Opinion" and argue that there was no evidence presented tending to show a "similarity" between the property lying to the north of Grand Avenue which was zoned C-3 and the appellants' property which was zoned C-2. Appellants also contend that the trial court has further misinterpreted the law of zoning in that such a similarity is not a proper justification for requiring that property zoned C-2 be treated the same as property in a C-3 district.

After a thorough review of the record this Court is of the opinion that the trial court's determination that the subject property "fronts approximately 1,110 feet on South Breiel Boulevard and 700 feet on Grand Avenue is not supported by the manifest weight of the evidence. The

exhibits demonstrate that the subject property has no frontage on Breiel Boulevard but has only access to Breiel Boulevard by means of Lewis Street.

Whether a similarity exists between property given substantially different treatment under a city wide comprehensive zoning ordinance is not a proper justification for holding a zoning ordinance invalid as applied to that property. It is clear that where, as in the instant case, limitations are put upon the use of property under a comprehensive city wide zoning ordinance that the districts established thereby must have definite boundaries. Obviously, property abutting upon the boundaries must be affected to some degree by proximity to the boundaries of the zone. Such a situation is inevitable unless the entire community is placed in one unrestricted zone. The courts have consistently refused to interfere with the legislative bodies fixing the boundaries of zones unless the exercise of this function indicates a capricious, arbitrary, and unreasonable action, entirely foreign to any considerations involving the safety, health, morals, or welfare of the community. *Central Trust Co.* v. *Cincinnati,* 62 O. A. 139; also *Zahn* v. *Board of Public Works,* 274 U.S. 325; *Willot* v. *City of Beachwoods,* 175 Ohio St. 557.

Where property is used for business purposes not permitted in the zone where located but consistent with uses permitted in an adjacent zone, the mere fact that such property abuts the other zone is not of itself sufficient basis to sustain a claim that said property be included in the permissible zone. *Central Trust Co.* v. *Cincinnati, supra.* Appellants' first assignment is well taken.

In their second assignment of error appellants contend that "the trial court erred in its findings of fact in that they were not supported by the weight of the evidence

and that the defendants have not clearly shown that the ordinance is unreasonable as to them".

We are of the opinion after examination of the record that the judgment of the trial court was manifestly against the weight of the evidence. Appellees failed to establish that the zoning ordinance as it is applied to the subject property does not bear a real and substantial relation to the public health, safety, morals, or general welfare and that it is therefore unreasonable and arbitrary. Appellants' second assignment is well taken.

Appellants contend in their third assignment that "the trial court erred in applying its own interpretation to the zoning ordinance and finding for defendants when such determination is at least debatable, in which case the determination of the city's legislative body must be sustained". Appellants argue that the trial court "erred in failing to recognize the total comprehensiveness of the plan of the zoning ordinance". Appellants draw attention in their brief to certain findings of fact and conclusions of law made by the trial court which, in their opinion, clearly demonstrate that the trial court failed to scrutinize the total comprehensiveness of the City's zoning ordinance.

After a review of the numerous authorities cited by the parties herein and a careful review of the record, we are in agreement with the arguments presented by appellants. We are also of the opinion that the record clearly establishes that the City's zoning ordinance as applied to the subject property bears a substantial relationship to the public health, safety, morals, and general welfare and that it is reasonable as to said property. Accordingly, we find appellants' third assignment to be well taken.

Appellants contend in assignment four that "the trial court erred in its finding that there are 'no guidelines set

forth' in the zoning ordinance to direct 'the zoning administrator' ".

Section 1141.01 of the City's zoning ordinance does not specify that only highway associated uses are permitted in a C-2 district, but provides that "it is the intent of the C-2 Roadside Commercial District to have low intensity, open and enclosed uses catering primarily to highway associated demands".

Section 1141.02, City Zoning Ordinance, sets forth the specific uses permitted in a C-2 zone and in addition provides in sub-section (f) as follows:

> *"Other Uses.* Any other business or service which is determined by the Planning Commission to be of the same general character as the above permitted uses, and not first permitted in a 'C-3', 'C-4' or 'CBD' Commercial District or in any Industrial District."

We find that the trial court erred in holding that "what is meant by 'highway associated demands' is left to an official such as the zoning administrator" and that "no guidelines are set forth to direct him". A perusal of the entire zoning ordinance leads this Court to the inescapable conclusion that the legislative body which enacted the City's zoning ordinance did not intend the C-2 zone and property included therein to be restricted to uses which are only highway associated uses. Similarly, it is evident that the zoning ordinance read in its entirety provides sufficient guidelines to direct the Planning Commission in its determination as to what other uses are permitted in a C-2 zone. It is, therefore, not necessary that the ordinance specifically define the term "highway associated demands". Appellants' fourth assignment is well taken.

In assignment five the claim is made that "Defendants have administrative remedies under the zoning ordinance

which have not been exhausted and for that reason the trial court erred in permitting them to raise the question of the validity of the ordinance in this case".

Appellants argue in support of this assignment that appellee failed to apply to the Planning Commission, pursuant to Section 1125.17 and Chapter 1171 of the zoning ordinance, for a determination that their proposed use was permissible. Appellants also contend that Chapter 1175 of the zoning ordinance provides for a variance granted by the Board of Zoning Appeals under certain circumstances.

We note that in the instant case appellants' application for a Certificate of Zoning Compliance was granted initially by the zoning administrator; that the evidence is conflicting as to whether the zoning administrator told appellees that their use was not permitted in a C-2 zone; and that the commissioner of inspection initially issued the building permits and later amended said permits. At no time prior to the filing of appellants' Complaint did appellees receive rulings adverse to their position and from which an appeal could have been prosecuted pursuant to Chapter 2506, Ohio Revised Code. Because the required permits were granted, appellees argue that variances were not required and that no determination of the permissability of their uses by the Planning Commission was necessary. Appellants take the position that to permit the appellees to attack the validity of the ordinance in the instant case would render the zoning ordinance useless.

We find that the trial court correctly permitted appellees to raise the issue of the zoning ordinance's validity. The actions of the zoning administrator and commissioner of inspection in issuing to appellees a Certificate of Zoning Compliance and building permits precluded the necessity for any further administrative proceedings as a condition

precedent to attacking the validity of the zoning ordinance. Appellants' fifth assignment is not well taken.

Upon oral argument appellees raised the issue of whether appellant City should be estopped by the actions of its zoning administrator in issuing the Certificate of Zoning Compliance and the actions of its commissioner of inspection in issuing and amending the building permits. It is the conclusion of this Court that the ruling by the trial court that appellant was not estopped from bringing this action to enforce its zoning ordinance was correct. The City is not estopped by the erroneous unauthorized actions of the zoning administrator and commissioner of inspection. 37 Ohio App. 102; see also Section 1173.02 (a), City's Zoning Ordinance.

It is, therefore, the order of this Court that the judgment of the Court of Common Pleas of Butler County, Ohio be, and the same hereby is, reversed and this cause remanded to the Court of Common Pleas for issuance of the requested injunction.

HESS, P. J., and SHANNON, J.
PALMER, J., not participating.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

THE SUPREME COURT OF THE STATE OF OHIO

1974 TERM

To wit: May 10, 1974

No. 74-234

THE STATE OF OHIO,

City of Columbus.

CITY OF MIDDLETOWN,

Appellee,

vs.

KITTYHAWK, LTD., ET AL.,

Appellants.

MOTION FOR AN ORDER DIRECTING
THE COURT OF APPEALS
for Butler County
TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Elliott & Boyd.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this .... day of ..... 19....

..... Clerk

..... Deputy

THE SUPREME COURT OF OHIO

1974 TERM

To wit: May 10, 1974

No. 74-234

THE STATE OF OHIO,

City of Columbus.

CITY OF MIDDLETOWN,

Appellee,

vs.

KITTYHAWK, LTD., ET AL.,

Appellants.

APPEAL FROM THE COURT OF APPEALS
for Butler County

This cause, here on appeal as of right from the Court of Appeals for Butler County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Butler County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foreoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this ..... day of ..... 19....
..... Clerk
..... Deputy

FILED
AUG 31 1974
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER Term, 1974

No. 74-82

KITTYHAWK, LT'D.
ESCO DISTRIBUTING CO.

and

MILES FABRICS OF MEMPHIS, INC.
Petitioners,

v.

CITY OF MIDDLETOWN
MIDDLETOWN SHOPPING CENTER, INC.

and

MANUEL D. MAYERSON
Respondents.

BRIEF OF RESPONDENT CITY OF MIDDLETOWN OPPOSING CERTIORARI

TILMON A. ELLISON
2114 Central Avenue
Middletown, Ohio 45042

Attorney for Respondent City
of Middletown

COURT INDEX PRESS, INC. — 809 Walnut Street, Cincinnati, Ohio 45202 — (513) 241-1450

INDEX

Page

Statement of the Case Made to Clarify Petitioners' Statement Thereof 1

Further Review. Respondent Submits. Is Not Justified

1. The Middletown Zoning Ordinance is in Accord with the Tests Set out in *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 4

2. The Middletown Zoning Ordinance is in Accord with the Tests Set out in *Nectow* v. *Cambridge*, 277 U.S. 183 8

3. Similarity Between Respondents' Property and Property in Another Zoning District is not a Criterion of Equal Protection Where a Comprehensive Zoning Ordinance is Concerned. 9

4. Under the Circumstances of this Case, the City Should Not Be Estopped to Challenge the Unauthorized Acts of Its Agents. 11

Conclusion 13

CITATIONS

Cases: **Page**

Blacklidge v. Gulfport, 223 So. 2d 530 10
Dobbins v. Los Angeles, 195 U.S. 223 12
Euclid v. Ambler Realty Co., 272 U.S. 365 ..... 4, 7
Miller v. Board of Public Works, 195 Cal. 477; 38 A.L.R. 1479 ..... 8, 10
McGuire v. Reardon, 255 U.S. 271 12
Nectow v. Cambridge, 277 U.S. 183 ..... 8, 13
Pritz v. Messer, 112 Ohio St. 628 ..... 8, 13
Willott v. Beachwood, 175 Ohio St. 557 14
Zahn v. Board of Public Works, 274 U.S. 325 .. 8, 9, 10, 13

Texts:

119 A.L.R. 1503 12
McQuillen, "Municipal Corporations", 1965 Rev. Vol. 8 9-10
Metzenbaum, "Law of Zoning", 2nd Edition, Vol. 3 .. 7

Statutes:

Ohio Revised Code:
Secs. 713.07 to 713.10 7

Middletown Zoning Ordinance: **Page**

Sec. 1139.01 5
Sec. 1139.02 4
Sec. 1139.06 6
Sec. 1139.08 6
Sec. 1139.09 6
Sec. 1141.02 4
Sec. 1141.06 6
Sec. 1141.08 6
Sec. 1141.09 6
Sec. 1143.01 5
Sec. 1143.06 6
Sec. 1143.08 6
Sec. 1143.09 6

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER Term, 1974

No. 74-82

KITTYHAWK, LT'D.
ESCO DISTRIBUTING CO.

and

MILES FABRICS OF MEMPHIS, INC.
Petitioners,

v.

CITY OF MIDDLETOWN
MIDDLETOWN SHOPPING CENTER, INC.

and

MANUEL D. MAYERSON
Respondents.

BRIEF OF RESPONDENT CITY OF MIDDLETOWN OPPOSING CERTIORARI

STATEMENT OF THE CASE MADE TO CLARIFY PETITIONERS' STATEMENT THEREOF

Under the zoning ordinance of the City of Middletown a C-3 commercial district is located at the northeast corner of Breiel Boulevard and Grand Avenue. The property owned by Petitioner Kittyhawk, Lt'd. is in a C-2 commercial

district, located at the southeast corner of Briel Boulevard and Grand Avenue, which is of the same approximate size as the C-3 district at the northeast corner. Opposite these two districts, on the west side of Briel Boulevard are C-1 and other C-2 commercial districts (not shown on Petitioners' sketch p. 6). Petitioners' property comprises the east part of the C-2 district in which it is situated and has no frontage on Breiel Boulevard but has access to that street by means of Lewis Street, a public street which has its eastern terminus at Petitioners' west property line, approximately 200 feet from Briel Boulevard.

In July, 1972, Petitioner Kittyhawk submitted plans for a commercial building for its property to the Zoning Administrator of the City of Middletown. The zoning ordinance of the City requires that a "Certificate of Zoning Compliance", certifying that the proposed uses are proper, must be obtained from the Zoning Administrator and then presented to the Commissioner of Inspection (Building Commissioner) before that official issues a building permit for the structures which will house the use or uses. The plans, among other things, showed that the proposed building would be occupied by a supermarket, a drug store, a fabric center and a tile and carpet store. The Zoning Administrator, at the trial of this case, testified that he informed Petitioner Kittyhawk's contractor (who applied for the certificate) that the the supermarket and drug store were proper uses but that the fabric center and the tile and carpet store were not. He then issued a Certificate of Zoning Compliance for "a commercial building" without specifying what uses were to be housed therein. This was presented to the Commissioner of Inspection, who thereupon issued the building permit and construction was thereafter started.

When the building was approximately half completed,

the owner, Kittyhawk, and the prospective tenants, the drug store and the tile and carpet store, for reasons not shown at the trial of this case, declined to enter into leases and Kittyhawk then obtained Petitioner Esco Distributing Co., a discount catalog store which is first permitted in a C-3 district. The latter required greater space for its operation and the building plans were altered to accommodate this requirement.

Petitioner Kittyhawk's contractor then presented amended building plans to the Commissioner of Inspection, as required by the Building Code of the City, but failed to first obtain a new Certificate of Zoning Compliance from the Zoning Administrator. The Commissioner of Inspection issued a new building permit but, as he testified at the trial, he told Kittyhawk's agent to "contact zoning and clarify the Esco use." Petitioner did not do this.

While the building was still under construction, the Zoning Administrator delivered a written notice to Petitioners that the Esco use and the fabric store would be in violation of the zoning ordinance. Thereafter, in October, 1972, the City filed this action to enjoin Petitioners from using the building for these purposes. The propriety of the A & P grocery store in the building was not questioned by the City.

FURTHER REVIEW, RESPONDENT SUBMITS, IS NOT JUSTIFIED

1. The Middletown Zoning Ordinance is in accord with the tests set out in Euclid v. Ambler Realty Co. 272 U.S. 365.

On Pgs. 9-10-11 of their Petition Petitioners place heavy emphasis on the words "highway associated demands" used in connection with uses permitted by the zoning ordinance in the C-2 district in which their property is situated. But they fail to mention that *all uses permitted in a C-1 district* are also permitted in their C-2 district.

Thus, the uses permitted in a C-2 zone are:[1]

> (1) bakery shops, beer and wine carry-outs, candy shops, delicatessens, drug stores, groceries and markets, magazine and newsstands, meat, fruit and vegetable markets and tobacco shops; barber and beauty shops, dry cleaning and laundry pick-up stations, funeral homes and mortuaries including emergency ambulance service, laundromats, professional offices, shoe repair, talent instruction, branch banks and loan institutions and real estate and insurance offices; ice cream parlors and soda fountains, pizza houses, tea rooms, restaurant and lunch rooms, service stations and repair, shopping groups and "any other retail business or service which is determined by the Planning Commission to be of the same general character as the above uses";
>
> (2) sale of building materials, farm produce stands, farm implements mobile home sales, nurseries, including greenhouses, trailer sales, beer and wine carry-outs and pottery and souvenir shops; business and professional offices, lawn and garden equipment rental

[1] Secs. 1139.02 and 1141.02 of the Zoning Ordinance (P. 17-18-22-23 Petitioners' Appendix)

> and service, appliance and business machine service, motels, animal clinics and kennels, indoor and outdoor motion picture theaters, post office branches and transient mobile home parks or courts, truck stops, banquet halls and private clubs, auto parts sales, vehicle rental and storage, automatic car washes and any other business or service which is "determined by the Planning Commission to be of the same general character as the above-permitted uses."

Consequently, the emphasis by Petitioners on the words "uses catering primarily to highway-associated demands" is not a fair treatment of the subject of what uses are actually permitted in a C-2 district, when it is readily seen from the nature of these uses permitted on their property that many of these do not necessarily cater to "highway associated demands".

In fact, since *all* uses permitted in a C-1 zone are also permitted in a C-2 zone it must be said that the intent of a C-2 zone also encompasses the intent of a C-1 zone, which is "to have low-intensity, enclosed uses providing primarily convenience goods and personal services *for persons residing in the adjacent residential areas.*"[2]

On the other hand, the intent of a C-3 district is:

> "to have *high intensity* enclosed uses providing both convenience goods and major shopping needs *for the entire city or a major portion thereof.*"[3]

Petitioners Esco Distributing Co. and Miles Fabrics of Memphis are "high intensity uses providing major shopping needs for the entire City or a major portion thereof". In fact, in the record is the testimony of Esco's officer that

---

[2] Sec. 1139.01 of the Zoning Ordinance (Petitioners' Appendix)

[3] Sec. 1143.01 of the Zoning Ordinance.

his store had printed 50,000 catalogues and had distributed these in the City of Middletown, the City of Franklin and the City of Lebanon and in the parts of Butler County and Warren Counties which lie between these cities, and that the intent was to keep Middletown residents from "going to Cincinnati and Dayton to shop."

In addition to the C-1, C-2 and C-3 districts provided in the zoning ordinance there are also C-4 and CBD (Central Business District), the latter two also providing wide-area shopping needs.

The trial court, in finding the ordinance invalid as it attempted to impose different commercial use restrictions upon these various commercial districts, did so *solely* upon the basis of similarity of some uses permitted in one district to those permitted in another. But for each of these commercial districts there are other regulations in addition to the *use* regulations recited above. It was these other regulations which the trial court (so found by the Court of Appeals[4]) overlooked. There are maximum sizes for stores in C-1 and C-2 districts and none for those in C-3, C-4 or CBD.[5] There are height regulations for each,[6] building set-back lines and yard areas,[7] and off-street parking requirements,[8] all differing for the respective districts and all in proportion to the use regulations for the districts.

All of these factors justify the "classification distinctions

---

[4] P. 54 of Petitioners' Appendix.

[5] Secs. 1139.09, 1141.09, 1143.09 of the Zoning Ordinance (Petitioners' Appendix).

[6] Secs. 1139.08, 1141.08, 1143.08 of the Zoning Ordinance.

[7] Secs. 1139.08, 1141.08, 1143.08 of the Zoning Ordinance.

[8] Secs. 1139.06, 1141.06, 1143.06 of the Zoning Ordinance.

between C-2 and C-3 uses" against which petitioners argue on p. 10 of their Petition.

The Middletown ordinance basically differs very little from the Euclid ordinance, which is set out in its entirety in Vol. 3, pg. 1939, James Metzenbaum, 2nd Edition, "Law of Zoning."

As to the Euclid ordinance, Mr. Justice Sutherland, in *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 wrote on pg. 381-382:

> "Class U-1 is the only district in which buildings *are restricted to those enumerated. In the other classes the uses are cumulative;* that is to say, *uses in U-2 include those enumerated in the preceeding class,* U-1; Class U-3 includes uses *enumerated in the preceding classes*, U-2 and U-1; and so on. . . ." (Emphasis ours)

He then points out the height regulations in the various districts and the area requirements in these, and then says:

> "The ordinance contains, in great variety and detail, provisions in respect of *width of lots, front, side and rear yards, and other matters. . . ."* (Emphasis ours)

It is also noted that the Ohio law under which the Middletown ordinance was passed (in 1968) was *exactly the same* as that which was in effect when the *Euclid* ordinance was pasesd (circa 1925,) and the same factors involved in the plan of that ordinance were involved in the Middletown Ordinance.[9] It is these factors which have determined the "comprehensiveness" of the zoning ordinance,[10] respondents say, notwithstanding petitioners' footnote 4 on p. 10 of their Petition.

---

[9] Ohio Revised Code Sections 713.07, 713.08, 713.09 and 713.10.

[10] Webster, "New World Dictionary," defines "comprehensive" as "covering many details."

2. The Middletown Zoning Ordinance is in accord with the test set out in Nectow v. Cambridge, 277 U.S. 183.

On p. 11 of their Petition petitioners say:

> "Further, the *extremely limited* uses permitted in a C-2 zone, vis-a-vis those in a C-3 zone, have effectively confiscated the Petitioner's property rights and deprived Petitioner of its basic liberty to develop its property in a manner which could be reasonably related to the public health, safety, morals and welfare of the general public." (Emphasis added)

Never, at any time during the course of this Case, have petitioners shown, or sought to show, *that the property cannot be feasibly and economically used* for the C-1 and C-2 uses, enumerated earlier herein, for which it is zoned and which, it is submitted, are not "extremely limited." In fact, the record shows that one of the tenants in its building (of the three therein) is an A & P store (a permitted use) and that in the course of constructing the building petitioner Kittyhawk substituted for a drug store (a permitted use) the petitioner Esco Distributing Co. In short, its building, *which is itself proper under the zoning ordinance,* is amenable to the many proper and profitable commercial uses allowed it under the ordinance.

On this point, Mr. Justice Sutherland, in *Nectow* v. *Cambridge,* 277 U.S. 183, wrote that to zone property for a purpose "for which it *cannot be profitably used* comes

---

10 (Continued)

Also, *Miller* v. *Board of Public Works,* 195 Cal. 477; 38 A.L.R. 1479 (cited favorably by this Court in *Zahn* v. *Board of Public Works,* 274 U.S. 325) wherein the California Supreme Court speaks of it as the "scheme of zoning")

And *Pritz* v. *Messer,* 112 Ohio St. 628, wherein (Syllabus 1) the Ohio Supreme Court speaks of the "comprehensive plan" involving all these factors.

within the ban of the 14th Amendment." A fortiori where property has been zoned for a purpose or purposes for which it *can be profitably used,* as a part of a comprehensive plan to zone the entire city, which includes all the factors mentioned earlier herein, such act promotes the public health, morals, safety and general welfare of all the residents of the city and does not come within that ban. See: *Zahn* v. *Board of Public Works,* 274 U.S. 325.

3. Similarity between respondents' property and property in another zoning district is not a criterion of equal protection where a comprehensive zoning ordinance is concerned.

On p. 11 of their petition, petitioners decry the C-2 classification of the district in which their property is located, because a less restricted (C-3) district lies to the north across Grand Avenue (their sketch p. 6).

The trial judge, p. 43-44 of their Appendix, found the two districts to be similar in their physical natures and said:

> "Zoning laws must be impartially applied as to *all properties which are similarly situated."* (Emphasis ours)

These commercial districts, the record shows, notwithstand petitioners' footnote 6 on p. 12, are situated in the heart of the City's residential areas. McQuillen, "Municipal Corporations", 1965 revised Vol. 8, Section 25.115, says:

> "it is within the discretion of a municipal legislative body to *determine the boundaries* of shopping and business centers *in residential districts* and to determine *whether a business center in a residential district should be enlarged;* courts will not interfere with the

> exercise of such discretion except for clear abuse. *The mere fact that an owner may enjoy greater benefits, or that his property will be enhanced in value, if the size of the center is increased, cannot entitle him to compel the allowance of such increase in size.*" (Emphasis ours)

Having this discretion to determine to place a commercial zone in a residential area, it is submitted that it necesarily follows that the legislative authority has the further discretion to place *different categories* of commercial zones within that residential area. McQuillen, "Municipal Corporations", 1965 Revised Volume 8, Section 25.112 says:

> "It is customary and proper, particularly in large cities in which there are numerous business enterprises, to classify commercial districts according to the extent of restrictions against business, industrial and mercantile uses. For example, commercial districts may be divided into classes lettered from "A" to "D" *according to the restrictions to which they are subject.* An ordinance may establish a "medium volume business zone," "local business (as distinguished from general business) zone, a combined commercial-residential zone, or the like." (Emphasis ours.)

and in the 1972 Cumulative Supplement to that Volume, Section 25.112:

> "It has been *universally* held that a city can establish *more than one type* of commercial or business district" (Citing *Blacklidge* v. *Gulfport* 223 So. 2d 530) (Emphasis ours.)

Zahn v. *Board of Public Works* 274 U.S. 325, cites the California Supreme Court in *Miller* v. *Board of Public Works*, 195 Cal. 477; 38 A.L.R. 1479. That Court held, among other things:

"The objection to the ordinance as unjust and discriminatory because of the fact that property in *adjacent territory* is included in zone C (business) is not well taken . . . the mere fact that *outside* of the . . . district there was *other property similar in nature and character* would not justify the court, upon ascertaining that fact, to substitute its judgment for the legislative judgment. *The boundary line of a district* must always be more or less arbitrary, for the property on one side of the line cannot, in the nature of things, be very different from that immediately on the other side of the line. (Emphasis ours.)

"*Somewhere the line of demarcation must be drawn* and it is primarily to the province of the municipal body to which the zoning function is committed to draw that line of demarcation and it is neither the province nor the duty of courts to interfere with the discretion with which such bodies are invested, in the absence of a *clear* showing of an abuse of that discretion. . . ." (Emphasis ours).

4. Under the circumstances of this case, the city should not be estopped to challenge the unauthorized acts of its agents.

It would seem that where Petitioner Kittyhawk's agent, though admonished to see the Zoning Administrator and "clarify the Esco use" at the time he received the amended building permit to house the Esco use, wilfully failed to do so, Petitioners should not be permitted to say that the City is estopped from challenging the wrongful issuance of the permit by its own agent. By its act, or failure to act, Petitioner Kittyhawk has placed itself in its present position.

But even were the above not so, the City should not be estopped.

In 119 A.L.R. 1503 is an extended annotation on this subject wherein it is said:

> "Most of the cases are to the effect that a municipality is not precluded from enforcing a zoning regulation *by the fact that one or more of its officers or servants has exceeded his authority by issuing a permit contravening the terms of such regulation; and this notwithstanding that the holder of the permit has proceeded thereunder to his detriment before the municipality seeks to enforce the regulation against him.*" (Emhasis ours)

Petitioners cite the case of *Dobbins* v. *Los Angeles,* 195 U.S. 223 (1904), as their chief argument for estoppel. There, however, the City had adopted an ordinance which *permitted the property owner to build her business* on the property in question. After she had obtained a permit from the City's proper officials and had commenced construction, the City amended the ordinance to exclude her property from the area in which such a business could be constructed. This court held that she was protected by the 14th amendment.

In *McGuire* v. *Reardon,* 255 U.S. 271 (1920), the property owner had constructed a building *in violation of the ordinance in effect* at that time and this court held that the 14th amendment did not prevent municipal authorities from requiring the building to be destroyed.

It is submitted that *Dobbins* does not apply here, but the principle in *McGuire* does apply. In *Dobbins* the property owner was given a right by law (the ordinance) which, once vested by reason of her commencing construction, could not be taken away. In *McGuire* the property owner was never given the right by law, but, rather, was forbidden by ordinance to construct the building.

CONCLUSION

The three leading cases on the subject of zoning in this country are *Euclid* v. *Ambler, supra,* which established that a city can divide its territory into separate zoning districts for single-family residences, apartments, business and industry; *Zahn* v. *Board of Public Works, supra,* which determined that such an ordinance, as it applied to a single owner and his property, would be held valid when not oppressive to his property and *Nectow* v. *Cambridge, supra,* in which it was determined that such an ordinance would be held invalid as to an owner and his property where he could make no suitable use of that property for the purposes for which it had been zoned.

The Ohio Supreme Court, in *Pritz* v. *Messer,* 112 Ohio St. 628 (1925), in syllabus 2, said:

> "An ordinance enacted by a municipality under Article XVIII, Section 3, of the Ohio Constitution, and under Sections 4366-1 to 4366-12, General Code, dividing the whole territory of the municipality into districts according to *a comprehensive plan* which, in the interest of the public health, public morals, *regulates the uses and the location of buildings and other structures and of premises to be used for trade, industry, residence, or other specific uses, the height, bulk, or location of buildings and other structures* thereafter to be erected or altered, including the *percentage of of lot occupancy, setback building lines* and *the area of yards* courts and other spaces, and for such purpose divides the city into zones or districts of such number, shape, and area as *are suited* to carry out such purposes, and provides a method of administration therefor, and prescribes penalties for the violation of such provisions, is a valid and constitutional enactment." (Emphasis ours)
>
> (Note: Sections 4366-1 to 4366-12 of the General Code are now Sections 713.01 to 713.12, Revised Code.)

Here the City has enacted an ordinance which regulates not only uses, but also location of buildings, height, bulk, percentage of lot occupancy, setback building lines and area of yards, all according *"to a comprehensive plan"* as contemplated by the Ohio Supreme Court in that syllabus.

That comprehensive plan called for a C-3 zone in this particular area, with "buffer" areas between it and the surrounding residential areas, comprised of C-2 and C-1 zones, in the interests of the public health, safety, morals and general welfare. On this point, the Ohio Supreme Court, in *Willott* v. *Beachwood*, 175 Ohio St. 557, said:

> "The determination of the question of whether regulations prescribed by a zoning ordinance have a real or substantial relation to the public health, safety, morals or general welfare is committed, in the first instance, to the judgment and discretion of the legislative body. *Where such a judgment deals with the control of traffic, volume of traffic, effect upon valuation of property, municipal revenue to be produced for the city, expense of the improvement, land use consistent with the general welfare and development of the community planning as a whole, or, in short, where the judgment is concerned with what is beneficial or detrimental to good community planning it is in the first instance a legislative and not a judicial matter. The legislative, not the judicial authority is charged with the duty of determining the wisdom of zoning regulations, and the judicial judgment is not to be substituted for the legislative judgment in any case in which the issue or matter is fairly debatable."* (Emphasis ours)

The petitioners would have these C-1 and C-2 zones declared invalid and would have all of the resultant commercial area used for C-3 purposes, "serving the entire city or a major portion thereof." The increased volume, burden and control of traffic which then would descend upon the surrounding residential areas would be un-

manageable and totally inimical to the public health, safety, morals and general welfare.

It is respectfully submitted that the federal questions raised in the Ohio courts in this case were decided by them in a way which is in accord with applicable zoning decisions of this Court.

Likewise, as to the City's being estopped by the wrongful acts of its agents, it is respectfully submitted that the State courts' decision was in accord with decisions of this Court on that subject.

TILMON A. ELLISON

2114 Central Avenue
Middletown, Ohio 45042

Attorney for Respondent
City of Middletown

INDEX

Page

Statement of the Case 1

Petitioners' Petition for a Writ of Certiorari Should be Denied

1. Petitioners offer insufficient evidence to support their contention that the decision in this case is in conflict with the decision of this Court in *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926) 2

2. Petitioners offer insufficient evidence to support their contention that the decision in this case is in conflict with the decision of this Court in *Nectow* v. *Cambridge*, 277 U.S. 183 (1928) 6

3. The evidence offers no basis for estoppel against the City of Middletown. 9

Conclusion 15

CITATIONS

Cases:	Page
Central Bank and Trust Co. v. City of Miami Beach, Florida, 392 F. 2d 549 (5 Cir. 1968)	5
C. F. Lytle v. Clark, 491 F. 2d 834 (10 Cir. 1974)	4, 8
City of Aurora v. Burns, 319 Ill. 84, 149 N.E. 784 (1927)	7-8
Eskridge v. Sandusky, 73 Ohio L. Abs. 568, 136 N.E. 2d 465 (1955)	14
Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)	2, 6
Haba v. Cuff, 28 Ohio Op. 2d 266, 201 N.E. 2d 343 (1963)	14
Kilko v. Cleveland, 60 Ohio L. Abs. 561, 102 N.E. 2d 476 (1951)	14
Kroeger v. Stahl, 248 F. 2d 121 (3 Cir. 1957)	4
Maher v. City of New Orleans, 371 F. Supp. 653 (E.D. Louisiana 1974)	3, 8
Mastroianni v. Board of Liquor Control, 69 Ohio L. Abs. 431, 119 N.E. 2d 147 (1954)	14
Nectow v. Cambridge, 277 U.S. 183 (1928)	6
South Gwinnett Venture v. Pruitt, 491 F. 2d 5 (5 Cir. 1974)	2
State ex rel. The Killeen Realty Co. v. East Cleveland, 169 Ohio St. 373, 159 N.E. 2d 764 (1959)	7
Spiecker v. Board of Rapid Transit Commissioners, 37 Ohio App. 102, 174 N.E. 15 (1930)	13
Zahn v. Board of Public Works, 274 U.S. 325 (1927)	7

Texts: **Page**

6 A.L.R. 2d 960 (1944) *Rights of permittee under illegally issued building permit* 12
1 A.L.R. 2d 338 (1948) *Applicability of doctrine of estoppel against government and its governmental agencies* 13
28 Am. Jur. 2d § 130, *Estoppel and waiver* (1966) .. 12
58 Am. Jur. § 192, *Zoning* 15

Middletown Zoning Ordinances:

Sec. 1141.01-1141.09 incl. 3

In The

SUPREME COURT OF THE UNITED STATES

No. 74-82

KITTYHAWK, LTD.
ESCO DISTRIBUTING CO.

and

MILES FABRICS OF MEMPHIS, INC.,
Petitioners,

vs.

CITY OF MIDDLETOWN
MIDDLETOWN SHOPPING CENTER, INC.

and

MANUEL D. MAYERSON,
Respondents.

BRIEF OF RESPONDENTS MIDDLETOWN SHOPPING CENTER, INC. and MANUEL D. MAYERSON OPPOSING CERTIORARI

STATEMENT OF THE CASE

Respondents, Middletown Shopping Center, Inc. and Manuel D. Mayerson, adopt the statement of the case as set forth on pages 1, 2, and 3 of the Brief of respondent, City of Middletown, as and for their own.

PETITIONERS' PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

1. Petitioners offer insufficient evidence to support their contention that the decision in this case is in conflict with the decision of this Court in Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

Petitioners, on pages 8 through 11 of their brief, argue that the Middletown, Ohio ordinances do not meet the "fairly debatable" test (*Euclid* v. *Ambler*). In support of their argument petitioners offer only (1) the wording of the ordinance itself and (2) the fact that their property has no highway frontage.

Respondent, City of Middletown, in its brief, deals thoroughly with the uses permitted in the classifications under question discussing the many uses permitted in the "C-2" classification besides strictly highway-associated ones, pointing out the similarity between the Middletown ordinances and those under question in *Euclid* v. *Ambler*, *supra*, which were adopted under identical provisions of the Ohio Revised Code.

In *South Gwinnett Venture* v. *Pruitt*, 491 F. 2d 5 (5 Cir. 1974) the Court affirmed the District Court which had refused appellants relief when their business zoning had been denied. The District Court had held that "it was not the function of federal district courts to serve as zoning appeal boards; that the decision of local zoning authorities is an exercise of judgment legislative in character; and that these decisions are subject to judicial control 'only if arbitrary or if interested parties have been denied procedural due process'." The Court of Appeals, in its opinion, stated:

> "We adhere to the teachings of *Higginbotham* v. *Barrett*, 5 Cir., 1973, 473 F. 2d 745, in which it was held that local zoning is a quasi-legislative procedure, not subject to federal judicial consideration in the absence of arbitrary action. . . . A zoning commission is a quasi-legislative body. It is not required to make findings of fact or state the reasons for the action taken. Its actions are entitled to a presumption of validity. The only question which federal district courts may consider is whether the action of the Zoning Commission is arbitrary and capricious, having no substantial relation to the general welfare. . . ."

Chapter 1141 of the Codified Ordinances of the City of Middletown, Ohio which establishes the "C-2" zone is set forth verbatim in petitioner's brief. It contains no less than nine (9) detailed sub sections setting forth (1) Intent, (2) Principal uses permitted, (3) Conditional uses permitted, (4) Accessory uses permitted, (5) Required conditions, (6) Off-street parking and loading, (7) Height regulations, (8) Lot area and yard requirements, and (9) Maximum floor area. It is submitted that it would be hard to imagine a more detailed and comprehensive set of guidelines to be considered by city officials charged with making specific decisions on the issuance of building permits.

In *Maher* v. *City of New Orleans*, 371 F.Supp. 653 (E.D. Louisiana 1974) the Court stated, at page 664,

> "Most decisions hold, however, that zoning standards need not be specific but may be broad, general standards 'so long as they are capable of a reasonable application and are sufficient to limit and define the Board's discretionary powers.' "

Petitioners parenthetically inject (by footnote) into their argument and challenge whether the Middletown ordi-

nance was in fact comprehensive (Petitioners' brief page 10, footnote 4) without offering a thread of evidence to support their contention. In support of their claim that the ordinance is arbitrary and unreasonable they could have offered in evidence the transcript of those extended proceedings and hearings as they relate to this chapter. They did not offer evidence as to when they had acquired subject property which is certainly prerequisite as stated by the Court of Appeals in *Kroeger* v. *Stahl,* 248 F. 2d 121 (3 Cir. 1957) which held that *the fact that a landowner acquires property after a zoning ordinance is in full force and effect,* although not precluding him from attacking the validity of such ordinance *will weigh heavily against him in evaluating the extent of injury to his property.* (Emphasis added) This principle of law was stated another way by the U. S. Court of Appeals in *C. F. Lytle* v. *Clark,* 491 F. 2d 834 (10 Cir 1974) at page 838:

> "A landowner cannot create his own hardship and then require that zoning regulations be changed to meet that hardship."

In the trial of this case petitioners stipulated that the Middletown Ordinance was adopted in 1968. In their statement of the case they state that they purchased the subject property in early 1972. It would be incumbent upon the petitioners as a prerequisite to even arguing that their physical location made the ordinance arbitrary, capricious, and unreasonable to prove that their property, situated as shown on page 6 of their brief, had no highway frontage when the ordinance was adopted. No zoning ordinance could be enacted that could foresee the possible future transfer of property between private owners within a given district and this was the basis for the holding in *Kroeger* v. *Stahl, supra. A fortiori,* petitioners were charged with knowledge of the

zoning law at the time they purchased their property. They had no right to assume that the zoning would be other than as it existed then.

The Court of Appeals for the First Appellate District of Ohio, whose decision in the instant case, was allowed to stand by the Ohio Supreme Court when they dismissed petitioners' appeal, holding that no constitutional question existed, stated in its opinion:

> "Whether a similarity exists between property given substantially different treatment under a city wide comprehensive zoning ordinance is not a proper justification for holding a zoning ordinance invalid as applied to that property. It is clear that where, as in the instant case, limitations are put upon the use of property under a comprehensive city wide zoning ordinance that the districts established thereby must have definite boundaries. Obviously, property abutting upon the boundaries must be affected to some degree by proximity to the boundaries of the zone. *Such a situation is inevitable unless the entire community is placed in one unrestricted zone.* The courts have consistently refused to interfere with the legislative bodies fixing the boundaries of zones unless the exercise of this function indicates a capricious, arbitrary, and unreasonable action, entirely foreign to any considerations involving the safety, health, morals or welfare of the community. Central Trust Co. v. Cincinnati, 62 O.A. 139; also Zahn v. Board of Public Works, 274 U.S. 325; Willot v. City of Beachwood, 175 Ohio St. 557." (Emphasis added)

In *Central Bank and Trust Co.* v. *City of Miami Beach, Florida,* 392 F. 2d 549 (5 Cir 1968) in a declaratory judgment suit testing the constitutionality of the city's off-street parking requirement, the Court stated, at page 550:

> "Property owners attacking the validity of zoning laws have a high wall to surmount. Forty years ago, in

> the landmark case of Village of Euclid, Ohio v. Ambler Realty Co. (citation omitted) the Supreme Court established a test that severely limits the power of federal courts to declare zoning statutes and ordinances unconstitutional: 'If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. . . .'"

Respondents contend that at its worst the Middletown Ordinance is fairly debatable and argue that more properly it should be considered a model ordinance setting forth clear and certain guidelines for administration. It is submitted that if a zoning ordinance worded with such particularity as the one in issue be deemed unconstitutional, that other such ordinances, from almost every city, town and hamlet in the country, many less articulate, would be brought in question with the result that the fundamental concepts of *Euclid* v. *Ambler* could no longer be considered controlling.

2. Petitioners offer insufficient evidence to support their contention that the decision in this case is in conflict with the decision of the Court in Nectow v. Cambridge, 277 U.S. 183 (1928).

It has been fundamental in the law of zoning that a city may establish districts mandating the uses to which a property owner may put his property since the decision in *Euclid* v. *Ambler Realty Co., supra.*

It necessarily followed that this Court must define the circumstances in which such a classification might deprive a property owner of his constitutional right to use his land as he wished. That test was set forth by this Court in *Nectow* v. *Cambridge, supra* when it held that to zone

property for a purpose for which it can not be profitably used comes within the ban of the 14th Amendment. Conversely, in *Zahn* v. *Board of Public Works*, 274 U.S. 325 (1927) this Court stated:

> ". . . where property has been zoned for a purpose or purposes for which it can be profitably used, as a part of a comprehensive plan to zone the entire city, which includes all the factors mentioned earlier herein, such act promotes the public health, morals, safety and general welfare of all the residents of the city and does not come within that ban."

In the leading Ohio case, *State ex rel The Killeen Realty Co.* v. *East Cleveland*, 169 Ohio St. 373, 159 N.E. 2d 764 (1959) the Court granted a variance when there was *"no economically feasible use of the land."* (Emphasis added.)

It further quoted, in its opinion, from an annotation, *Constitutional Law in Community Planning*, 20 Law and Contemporary Problems 199 where it is observed:

> "At some undefinable point, regulation of property shades into taking of property, which must be compensated, though it must be conceded that the instances in which the court (United States Supreme Court) has determined that this point was exceeded are rare, and that there have been some examples of extreme legislative encroachments upon property which have gone uncompensated."

In *City of Aurora* v. *Burns*, 319 Ill. 84, 149 N.E. 784 (1927) the court commented, on the implications that must be expected in zoning:

> "No general zoning plan, however, can be inaugurated without incurring complaints of hardship in particular instances. But the individual whose use of his property may be restricted is not the only person to be considered. The great majority, whose enjoyment of

> their property rights requires the imposition of restrictions upon the uses to which private property may be put, must also be taken into consideration. The exclusion of places of business from residential districts is not a declaration that such places are nuisances or that they are to be suppressed as such, but it is a part of the general plan by which the city's territory is allotted to different uses in order to prevent, or at least to reduce, the congestion, disorder and dangers which often inhere in unregulated municipal development."

In *C. F. Lytle Co.* v. *Clark, supra,* the Tenth Circuit Court of Appeals applied this test when it said, at page 838,

> "The due process and just compensation clauses of the state and federal constitutions do not require that zoning ordinances permit a landowner to make the *most profitable* use of his property. For there to be a taking the landowners must show he has been deprived of *all reasonable uses* of his land."

In *Maher* v. *City of New Orleans, supra,* the United States District Court stated, at page 662:

> "A zoning ordinance, as an exercise of police power, will almost always reduce the value of rights of some individuals; but that does not make it unconstitutional . . . Such a law becomes confiscatory and thus unconstitutional only when it 'goes so far as to preclude the use of the property *for any purpose for which it is reasonably adopted.*' "

Petitioners cite no supporting cases for their contention that they are being deprived of equal protection of the law under that subtitle on page 11 of their brief. Neither did they introduce any evidence that they cannot economically use their property for the purposes for which it is presently zoned. It is submitted that the burden was on them to do just that and that, in absence of such proof,

their argument must fail under the controlling law stated above.

3. The evidence offers no basis for estoppel against the City of Middletown.

Petitioners, on page 13 of their brief, ask the Court to accept as fact a chronology of events on which they claim reliance to their detriment. Before setting forth respondent's citations relative to the law governing estoppel as applied to a municipal corporation, respondents would like to augment these six brief facts set forth by petitioners with references to the record in this case.

(1) Petitioners did in fact purchase the land, as indicated in the statement of their case at page 3, in "early 1972." As noted previously, they also stipulated that the comprehensive zoning ordinance No. 4886 was adopted December 27, 1968 (transcript page 26).

(2) Petitioners did in fact enter into an agreement with their contractor sometime after June 1, 1971 and prior to July 5, 1972 (Testimony of Kittyhawk partner Saylors, transcript pages 94 and 95) for the construction of a commercial building in the amount of $528,000.00. (Testimony of petitioners' architect, transcript page 68.)

(3) Petitioners secured a Certificate of Zoning Compliance from the Zoning Administrator on July 9, 1972 for a "commercial shopping center on Lewis Street" but applicant was told that the use of the Joan Fabric Shop (Petitioner Miles Fabrics of Memphis, Inc.) would not be permitted in this zone. (Testimony of Zoning Inspector, transcript pages 35 and 36.) No Certificate of Zoning Compliance was ever requested or issued for the catalog store use. (Petitioner Esco Distributing Co.) (Testimony of Zoning Inspector, transcript page 37.)

(4) A building permit was issued by the Building Inspector for an A & P store, a fabric shop, a tile and carpet shop, and a drug store immediately after the Certificate of Zoning Compliance was issued. (Testimony of Building Inspector, transcript pages 55 and 59.) An amended building permit was issued in September 1972 (Testimony of Building Inspector, transcript page 60) after petitioners' architect, on April 9, 1972, submitted revised plans to the Building Inspector, deleting two previous tenants and adding Esco Distributing Co. (Testimony of petitioners' architect, transcript pages 66 and 67.) The architect was told by Building Inspector to contact zoning for clarification of the Esco use. (Testimony of Building Inspector, transcript pages 60 and 61.)

(5) Petitioners executed long term leases, with A & P in April, 1972 and Fabric Center in May, 1972 (Testimony of Kittyhawk partner Saylors, transcript pages 89 and 92) and with Esco Distributing Co. on July 31, 1972 (Saylors, transcript page 92).

(6) Petitioners started construction in late July, 1972 (Testimony of Kittyhawk partner Saylors, transcript page 74). Petitioners' architect testified that the building was 55 per cent completed when the amendment to the building plans was made and 90 per cent completed on November 2, 1972, the date of the hearing (Testimony of petitioners' architect, transcript page 67).

Respondent submits the following additional facts from the transcript.

(1) Petitioners received a registered letter on October 16 or 17, 1972 notifying them that the proposed uses by Fabric Shop and Esco were not permitted in a C-2 zone (petitioners' statement of the case, page 4, testimony of Kittyhawk partner Saylors, transcript page 88).

(2) Petitioners were never issued a certificate of occupancy per codified ordinance 1173.05 City of Middletown and none was requested by petitioners (Testimony of Building Inspector, transcript pages 130 and 131) without which use or occupancy of the premises is unlawful (section 1173.05, petitioners' brief, page 35).

Respondents submit that the above testimony proves that petitioners could not have relied on the Certificate of Zoning Compliance which was issued on Jully 9, 1972 when it entered into leases with A & P and the Fabric Shop the previous April and May respectively. Likewise they did not rely on the Certificate of Zoning Compliance before contracting with McGraw Construction Co., their contractor, prior to July 5. They could not have relied on such a certificate in reference to the Esco use since none was ever requested or issued. One might also question the accuracy of the testimony that construction began in late July of a $528,000.00 building and that construction was 55 per cent complete less than two weeks later when petitioners amended their plans to include the Esco requirements.

If it be assumed for purposes of argument that the Certificate of Zoning Compliance for the fabric shop use was improperly issued, even though it was worded "for a commercial shopping center," the specific warnings given to petitioners' agent, the architect, that such use was not permitted in a C-2 zone, coupled with the fact that they must be presumed to know the law, should deny them the opportunity of claiming that the City of Middletown should be estopped from enforcing the ordinance. Even this argument need not be made in regards to the Esco use for which no Certificate of Zoning Compliance was ever issued.

It is submitted that the action by the City of Middle-

town to enjoin the illegal uses commencing with the notification thereof to petitioners on October 16, 1972, a little more than two months after initial construction began, was both prompt and responsible and they could in no way be charged with laches.

In 28 Am.Jur.2d *Estoppel and Waiver* § 130 (1966) at page 798 is contained a succinct statement of the law of estoppel as applied to municipalities.

> ". . . the doctrine of equitable estoppel cannot ordinarily be invoked to defeat a municipality in the prosecution of its public affairs or governmental functions because of an error or mistake of, or because of a wrong committed by, one of its officers or agents which has been relied upon by a third party to his detriment. . . . It has been stated that agency by estoppel has no proper place in the law of municipal corporations and that no estoppel can grow out of dealings with municipal public officers of limited authority in respect of matters as to which such authority has been exceeded."

In an annotation in 6 A.L.R. 2d 960 (1949), *Rights of permittee under illegally issued building permit*, at pages 961 to 964, it is stated:

> ". . . an invalid building permit vests no rights or privileges in the person to whom the permit has been issued. Numerous cases have applied this rule notwithstanding the resultant hardship to the permittee who had begun construction, or in some cases, expended considerable money in reliance upon the permit. The applicable principle . . . is that *every person is presumed to know the extent of power of the municipal authorities.* (emphasis added) . . . This is particularly true when the permit was issued by some administrative official as distinguished from the legislative body of the municipality."

The cases set out in this annotation demonstrate that the invalid permit may be revoked, and proposed construction thereunder prohibited by injunction, or construction which has been started may be stopped, or demolition or removal of the completed structure ordered, notwithstanding the resulting hardship to the permittee who may have acted in good faith.

In an annotation in 1 A.L.R. 2d 338 (1948) *Applicability of doctrine of estoppel against government and its governmental agencies,* at pages 351, it is stated:

> "Ordinarily a municipality is not estopped by a mistake, unauthorized act, laches, dereliction, or wrongful conduct on the part of a public official, and no estoppel can grow out of dealings with municipal public officers of limited authority where such authority has been exceeded."

Many Ohio cases have followed the doctrine set forth in the above annotations and are cited here. The Ohio Court of Appeals in *Spieker* v. *Board of Rapid Transit Commissioners,* 37 Ohio App. 102, 174 N.E. 15 (1930) held that unauthorized acts of city officials cannot result in estoppel against the city. The court quoted the rule at page 107 as follows:

> "On the other hand it is settled that the public, whether exercising its functions through a state or the federal government, or through a municipal corporation, county, town, township, or other governmental agency or instrumentality, cannot be estopped by unauthorized, illegal or fraudulent acts, admissions, conduct, or statements on the part of their officers and agents. . . . Because persons dealing with public officers and agents are bound by the constructive notice of the law and the public records as to the measure of their powers and functions, the public cannot, by the representations of the officers as to this matter, be estopped to deny their authority, even when acting within the

> apparent scope of their official functions; and this rule applies to all persons whatsoever who deal with or claim under the municipality either directly or remotely."

The law of Ohio is clear that the public authority cannot be estopped by the action of a public official, whether condoning other violations of the same law or actually issuing a permit which would authorize a violation of a zoning ordinance.

Thus in *Haba* v. *Cuff*, 28 Ohio Op. 2d 266, 201 N.E. 2d 343 (1963) in which an appeal was dismissed by the Ohio Supreme Court (176 Ohio St. 374) and certiorari denied by this Court (379 U.S. 964) and rehearing denied (380 U.S. 927) the court held:

> ". . . that a township was not estopped from enforcing a zoning regulation with reference to a structure, although the structure had been erected and used for six years in violation of zoning regulations and the township was granted an injunction to prevent the continued violation by such use."

Also see *Kilko* v. *Cleveland*, 60 Ohio L. Abs. 561, 102 N.E. 2d 476 (1951), *Eskridge* v. *Sandusky*, 73 Ohio L. Abs. 568, 136 N.E. 2d 465 (1955), and *Mastroianni* v. *Board of Liquor Control*, 69 Ohio L. Abs. 431, 119 N.E. 2d 147 (1954).

The mere failure of municipal authorities to make complaint of the violation of a zoning ordinance until discovery of the offense does not preclude their right to enforce the ordinance against the violator. Thus a delay in seeking to enjoin the erection of a building in violation of a zoning ordinance until after considerable work has been done thereon has been held not to estop the plaintiffs from maintaining the suit, where they could not be sure until that

time that there would be a violation of the ordinance. 58 Am. Jur. *Zoning* § 192 at page 1045.

In the instant case The City of Middletown and its officers have taken the consistent position throughout the chronology of events that they in no way objected to the design or size of the building erected by petitioners, only to its proposed use for a fabric shop (Miles Fabrics) and for a catalog store (Esco). Petitioners, on the other hand, in the trial of the case, offered no evidence of any construction peculiar to these illegal uses or that construction was accomplished that would have no value for uses permitted in the "D-2" zone. Respondents further contend that there was, in fact, no actual proof of reasonable reliance on any act of a city official. Even if respondents be found wrong in these contentions, the City of Middletown would not be estopped from enjoining petitioners' illegal uses under the controlling case law set forth herein.

CONCLUSION

Petitioners having failed to support their contentions under the controlling case law and having failed to carry their burden of proof against the heavy presumption of validity of the comprehensive zoning ordinances of the City of Middletown, their petition for a writ of certiorari to this Court should be denied.

Respectfully submitted,

C. RICHARD GREATHOUSE, JR.
207-8 Savings and Loan Building
Middletown, Ohio 45042

Counsel for Respondents
Middletown Shopping Center, Inc.
and Manuel D. Mayerson